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Sup. Ct.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 418

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

JONES & LAUGHLIN STEEL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 20, 1946
CERTIORARI GRANTED DECEMBER 22, 1946

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Page
Proceedings before National Labor Relations Board	1	1
Amended petition for investigation and certification of representatives, case No. R-5143	1	1
Transcript of testimony	3	2
Appearances	3	2
Offers in evidence	4	2
Statement of Mr. Blank	6	4
Testimony of F. W. Mumper	11	8
Statement of Mr. Blank	14	10
Testimony of F. W. Mumper (resumed)	18	13
Statement of Mr. Donovan	19	14
C. I. O. Exhibit No. 1—Agreement dated December 2, 1942 between Jones & Laughlin Steel Corporation and the United Steel Workers of America, C. I. O.	21	16
Report on ordered election	44	33
Notice of election	45	
Certification of representatives	47	34
Complaint, case No. 8-C-1548	49	35
Notice of hearing	53	38
Answer	54	38

712546—46——1

Proceedings before National Labor Relations Board—Con.	Original	Page
Transcript of testimony	57	41
Appearances	57	41
Offers in evidence	58	41
Stipulation as to certain facts	59	42
Board's Exhibit No. 2—Decision and direction of election in the Matter of Jones and Laughlin Steel Corp., Otis Works, Case No. R-5143	71	52
Board's Exhibit No. 4—Letter dated May 28, 1943 from William F. Donovan to Jones and Laughlin Steel Corporation	76	55
Board's Exhibit No. 5—Letter dated June 23, 1943 from Jones & Laughlin Steel Corporation to William F. Donovan	77	56
Board's Exhibit No. 6—Notice to patrolmen, watchmen, firemen, and dump laborers by Jones & Laughlin Steel Corporation	78	57
Respondent's Exhibit No. 1—Letter dated August 14, 1943, from Louis Plost to Jones & Laughlin Steel Corporation	79	57
Respondent's Exhibit No. 2—Letter dated September 4, 1943, from Jones & Laughlin Steel Corporation to Louis Plost	80	58
Respondent's Exhibit No. 3-A—Letter dated September 7, 1943, from Jones & Laughlin Steel Corporation to H. A. Millis	81	59
Respondent's Exhibit No. 4—Letter dated September 11, 1943, from John E. Lawyer to Jones & Laughlin Steel Corporation	83	61
Intermediate report	84	61
Exceptions and objections to intermediate report filed on behalf of Jones & Laughlin Steel Corporation	93	68
Decision and order	99	73
Proceedings in U. S. C. C. A., Sixth Circuit	102	75
Certificate of the National Labor Relations Board	102	75
Petition for enforcement of order of Board	104	76
Board's designation of portions of The record to be printed	107	79
Respondent's designation of portions of The record to be printed	109	80
Order granting leave for Chrysler Corporation to file brief amicus curiae	111	82
Argument and submission	111	82
Judgment denying Board's petition for enforcement	112	82
Opinion of December 8, 1944, Hicks, J	113	83
Order extending time for filing petition for rehearing	120	89
Petition for rehearing	121	89
Order granting motion to file brief and denying petition for rehearing	155	111
Order amending opinion	155	111

	Original	Page
Certified copy of order of U. S. Supreme Court granting certiorari	156	111
Order restoring case to calendar	157	112
Board's motion for decree enforcing its order	158	112
Stipulation, upon remand from the Supreme Court of the United States	162	114
Exhibit "A"—Letter dated May 29, 1944, from Army Service Forces to Jones & Laughlin Steel Corporation	168	117
Argument and submission	170	118
Decree denying enforcement of Board's order	170	118
Opinion of April 4, 1946, Allen, J.	171	119
Order extending time to file petition for rehearing	176	122
Petition for rehearing	177	123
Order denying petition for rehearing	198	134
Clerk's certificate [omitted in printing]	199	134
Order allowing certiorari		135

Case No. R-5143

Before the National Labor Relations Board, Eighth Region

Case No. VIII-R-1056

IN THE MATTER OF JONES AND LAUGHLIN STEEL CORP., OTIS WORKS, *and* UNITED STEELWORKERS OF AMERICA (CIO)

Amended petition for investigation and certification of representatives pursuant to section 9 (c) of the National Labor Relations Act

Filed March 15, 1943

1. Name of employer—Jones and Laughlin Steel Corp., Otis Works.

2. Address—Jennings Road, Cleveland, Ohio.

3. General nature of business—Iron and steel manufacture.

4. Description of the bargaining unit which petitioner claims is appropriate—All patrolmen, watchmen & firemen, including "dump laborers" but excluding lieutenants, captains, and other supervisors.

5. Approximate number of employees in such unit—60.

6. Approximate total number of employees in plant or plants involved—4,700.

7. Number or percentage of employees in such unit who have designated or selected petitioner to be their representative for collective bargaining—42.

2 8. Who is the present bargaining representative of employees?

9. Names, addresses, and affiliation of any other known individuals or labor organizations who claim to represent any of the employees in such bargaining unit—None.

10. Is there an existing or recently expired contract and if so give expiration date?—None.

11. The undersigned hereby alleges that a question has arisen concerning the representation of the employees in the above bargaining unit, in that: Company refused to bargain until union is certified by the National Labor Relations Board.

The undersigned further alleges that said question concerning representation is a question affecting commerce within the meaning of said act.

The undersigned requests that pursuant to section 9 (c) of the National Labor Relations Act, the National Labor Relations Board investigate such controversy and certify to the parties the name or names of the representatives that have been designated or selected by said employees.

Name and address of employees or representatives filing the petition. (If made by a labor organization, give also the full name, local number and affiliation of the organization and the name and official position of the person acting for the organization.)

UNITED STEELWORKERS OF AMERICA (CIO).
By LEO E. CASEY.
804 Chester Ninth Bldg.
Phone: Pr. 5690.

Subscribed and sworn to before me this 15th day of March 1943 at Cleveland, Ohio.

[SEAL] ARTHUR STARK,
Field Examiner, N. L. R. B., Eighth Region.

Before the National Labor Relations Board, Eighth Region

Case No. VIII–R–1056

In the matter of JONES & LAUGHLIN STEEL CORPORATION, OTIS WORKS, *and* UNITED STEELWORKERS OF AMERICA, CIO

Transcript of testimony

ROOM 213,
PUBLIC SQUARE BUILDING,
Cleveland, Ohio, Thursday, April 8, 1943.

Pursuant to notice, the above-entitled matter came on for hearing at 10 a. m.

Before: LOUIS PLOST, Trial Examiner.

Appearances

Earl F. Blank, Director Personnel Relations, Pittsburgh, and, F. W. Mumper, Personnel Department, Otis Works, appearing on behalf of the Company.

William F. Donovan, District Director, 804 Chester-Ninth Building, Cleveland, Ohio, appearing on behalf of the CIO.

Offers in evidence

Trial Examiner PLOST. Do any of you gentlemen care to examine these documents before I offer them in evidence?

Mr. BLANK. I believe we have received copies.

Trial Examiner PLOST. I will direct the reporter to amend all Board documents as they may appear to show the Company's name as being "Jones & Laughlin Steel Corporation," with the word "corporation" spelled in full, "Otis Works."

At the same time, I will instruct the reporter to amend the caption of the case to show the correct designation of the Company.

I will now offer Board's Exhibit No. 1 in evidence. Is there any objection?

(No response.)

Let the record show there is no response. Board's Exhibit No. 1 is received in evidence.

(The document heretofore marked for identification as "Board's Exhibit No. 1" was received in evidence.)

* * * * *

Trial Examiner PLOST. * * * During our off the record discussion, we were able to arrive at various stipulations, which I will now read into the record.

These stipulations will be by and among all the parties to the proceeding. When the phrase "all the parties" is used, it is to mean the Jones & Laughlin Steel Corporation and the United Steelworkers of America, CIO.

The first stipulation arrived at is a stipulation regarding the business and interstate commerce status of the Company. I will now read the stipulation into the record.

It is stipulated by and among the parties hereto that Jones & Laughlin Steel Corporation, Otis Works, is a corporation organized and existing by virtue of the laws of the State of Pennsylvania, and is registered to do business in the State of Ohio, as well as other states of the Union.

The only plant of the Company affected by this proceeding and stipulation is the Company's Otis Works at Cleveland, Ohio, which works combine the Company's Lakeside and Riverside plants at Cleveland, Ohio.

At this Otis Works, the Company is engaged in the manufacture of steel and steel products in various forms. The principal raw materials used by the Company in the manufacture of these products are coal, iron ore and limestone.

During the year 1942, the raw materials used by the Company and the finished products manufactured by the Company at its Otis Works amounted, in each instance, to more than $1,000,000.

More than 50 per cent of these materials and finished products came to the Company and were shipped and sold by the Company to points outside the State of Ohio.

At its Otis Works, the Company employs 72 plant-protection employees; these employees are divided into the following categories: 58 patrolmen, 2 firemen, 2 dump laborers, 8 lieutenants, 2 captains.

The Company is engaged in production for the National War Effort.

The Company is engaged in commerce within the meaning of the National Labor Relations Act.

Do you so stipulate, Mr. Blank?

Mr. BLANK. I would suggest, on those captains, that you call them "fire captains" because it might be confusing with the captain of the whole group.

Trial Examiner PLOST. All right, let the reporter change the designation of two captains to read to fire captains.

Do you so stipulate, Mr. Blank?

Mr. BLANK. Yes.

Trial Examiner PLOST. Do you so stipulate, Mr. Donovan?

Mr. DONOVAN. Yes.

Trial Examiner PLOST. The second stipulation arrived at is on the labor organization involved.

I will read the stipulation into the record.

6 It is stipulated by and among the parties hereto that the United Steelworkers of America, CIO, is a labor organization within the meaning of the National Labor Relations Act.

Do you so stipulate, Mr. Donovan?

Mr. DONOVAN. I do.

Trial Examiner PLOST. Do you so stipulate, Mr. Blank?

Mr. BLANK. Yes, sir.

Trial Examiner PLOST. The third stipulation arrived at concerns the question of representation, which I will now read into the record.

It is stipulated by and among the parties hereto that on February 17, 1943, the representatives of the United Steelworkers of America, CIO, informed the Company that they represented a majority of the employees within an appropriate unit, consisting of all patrolmen, watchmen and firemen, including the dump laborers, but excluding lieutenants, captains and supervisors employed at its Otis Works, and requested recognition as the bargaining agency.

The Company at that time refused to recognize the United Steel Workers of America, CIO, until it had been certified by the National Labor Relations Board.

Do you so stipulate, Mr. Blank?

Mr. BLANK. I think that is substantially correct. I don't know about the date, but I don't think it is very important.

Trial Examiner PLOST. For the purposes of the record, it will be sufficient?

Mr. BLANK. I believe so.

Trial Examiner PLOST. Do you so stipulate, Mr. Donovan?

Mr. DONOVAN. I do.

Statement of Mr. Blank

Mr. BLANK. I would like to read into the record, Mr. Examiner, a statement in connection with the Company's policy on the bargaining unit. I will furnish the Board with copies of this statement.

Trial Examiner PLOST. You may read the statement into the record.

Mr. BLANK. The Otis Works is owned and operated by
7 Jones & McLaughlin Steel Corporation of Pittsburgh, Pennsylvania. The Corporation, with its subsidiary companies, employs approximately 40,000 people of which 4,700 are employed at the Otis Works. The Otis Works consists of two plants known as the Riverside Plant, employing approximately 3,200 people; and the Lakeside plant, employing approximately 1,500 people. The Otis Works was formerly owned and operated by The Otis Steel Company and was acquired by Jones & Laughlin Steel Corporation by purchase at close of business on June 30, 1942.

At the time of this acquisition Jones & Laughlin Steel Corporation had a labor agreement with the Steel Workers Organizing Committee covering its plants at Pittsburgh, Aliquippa, and McKeesport, Pennsylvania. The Otis Steel Company, while not having a formal written signed agreement with the Union, operated under a memorandum that served as a labor agreement, such memorandum having been effectuated through the United States Conciliation Service. On July 21, 1942, the United Steelworkers of America, successor to the Steel Workers Organizing Committee, served notice on the Jones & Laughlin Steel Corporation that it desired to terminate the labor agreement currently in effect, and on August 3, 1942 negotiations looking to the consummation of a new agreement were started. At the request of the Union, the Otis Works was considered as being one of the units of the Jones & Laughlin Steel Corporation to be included in the new collective bargaining agreement—this notwithstanding the agreement to be entered into was an exclusive collective bargaining agreement and the Union had never been certified as the bargaining agency for employees of the former Otis Steel Company.

The new agreement between the parties was consummated on December 11, 1942, to be effective as of December 11, 1942, to be

effective as of December 2, 1942, and said contract is still in effect. Reference to Section 1 of this very recently consummated agreement indicates that is was and still is the intention of the parties
8 thereto to provide for the economic and efficient operations of the plants and the prevention of strikes and other disturbances which interfere with production, all of which should result in harmonious relationships between the Union and the Corporation.

The term "employe" in that agreement is defined as excluding foremen or Assistant Foremen in charge of any classes of labor, Watchmen, Salaried Employees, and Nurses.

These four groups occupy positions which by virtue of the character thereof necessarily render them perforce management representatives. It is evident from the above exclusions that the enumerated groups have interests so akin to that of the Corporation that it was, as late as December 11, 1942, the desire of both the Corporation and the Union to have these people serve management's interest without other affiliation.

It is the position of the Jones & Laughlin Steel Corporation in this case that the unionization of watchmen or guards is not appropriate at any time—certainly not at the present time in the midst of the War Program. Any allegation that same is in fact appropriate is, in our opinion, a direct contravention of the covenants of the existing labor agreement designed to effect higher managerial efficiency and the promotion of the War Effort.

It must be borne in mind that these guards are charged with the responsibility for the protection of the physical plant and equipment of the Corporation. It is their duty to keep intruders out, to see that the rules and regulations of the Corporation are maintained within the plant for the benefit of all concerned, to see that the peace is kept, and to act as conservators of the legal rights of the Corporation.

The duties of these guards do not differ greatly from the duties performed by members of a city, county or state police force. They do, however, have the additional responsibility of carrying out assignments of management which are very often of a confidential nature, and allegiance to management must be unquestioned.

Any thing which might tend to be destructive to the discipline normally manifested in a guard force can have
9 no other effect than weakening the plant protection system set up to effectively preserve and maintain industrial operations.

In addition, it must be realized that those guards are now and for some time past have been sworn in as Auxiliary Military Police, and, in this connection, are under the direct supervision

and jurisdiction of the United States Army and are currently receiving instructions from officers of the United States Army.

We believe that no better explanation of the obligations and duties of these guards in respect to their military affiliation can be given than is set forth in the oath of allegiance which every guard must read and sign; viz.

"Agreement between the United States of America and John Doe (Plant Guard).

"In order that the existing military forces of the United States may be most effectively employed to combat activity against the enemies of the United States, the United States is approving the employment of certain guards as a civilian auxiliary to the military police for the purpose of guarding and protecting war material, war premises and war utilities from injury or destruction by the enemy or otherwise, including the making of arrests, as peace officers for violations of Federal laws, as well as for violation of orders and regulations issued by military authority. The United States requests that only persons physically fit, well trained in the use of arms and in the duties incident to their position, and of unquestionable loyalty to the United States be so employed.

"Now, therefore, I, John Doe, who have been or am about to be employed by Jones & Laughlin Steel Corporation, Pittsburgh, Pa., as a guard at Otis Works for the purpose of guarding certain war material, war premises, and war utilities, in consideration of my employment or the continuation of my employment, do agree with the United States of America that:

"(1) I will support and defend the Constitution of the United States against all enemies, foreign and domestic;

"(2) I will bear true faith and allegiance to the Constitution of the United States;

"(3) I will well and faithfully discharge my duty as a civilian auxiliary to the military police to protect war material, war premises, and war utilities against all enemies, foreign and domestic, and will obey any orders issued in connection therewith by the President, as Commander in Chief of the Army and Navy of the United States, and by his duly authorized officers.

"(4) I acknowledge that the appropriate Articles of War have been read and explained to me, and that in the performance of my duty to protect such war material, war premises, and war utilities, I am subject to military law during the period of my employment.

(Date) (Signature of Plant Guard)

(Witness—Commissioned Officer—U. S. Army)"

It is the position of this Corporation that the guards in question perform certain assigned work that is strictly representative of management, and for the reasons above assigned, it is respectfully requested that this petition be dismissed.

Trial Examiner PIOST. As I understand you, you also at this time formally move to dismiss the Petition on the grounds that the unit of guards is not appropriate?

Mr. BLANK. That's right.

Trial Examiner PIOST. The ruling on the motion under the Rules and Regulations of the Board must be referred to the Board itself in Washington, and will be so referred.

* * * * *

F. W. MUMPER, a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Examination by Trial Examiner PIOST:

Q. State your name, your address and your connection with the Company, for the purposes of the record?

A. F. W. Mumper. Business address is the Otis Works, Jones & Laughlin Steel Corporation, Personnel Department.

Q. Mr. Mumper, you heard the reading of the stipulation regarding the commerce of the Company, in which the guard force was set out in more or less detail. There are 72 plant-protection employees; is that correct, approximately?

A. Approximately.

Q. 58 of whom are patrolmen; is that correct?

A. That would be approximately right.

Q. Now, what are the duties of these patrolmen or guards, as you call them?

A. To protect the plant property, the employees of the Company, and such other things of that nature that may be necessary.

Q. Are these men armed while they perform their duties? Do they carry weapons?

A. Frankly, I am not sure whether they do, now. I believe that they do.

Q. Do they wear uniforms?

A. Yes.

Q. Have all of these men taken the oath of an auxiliary policeman as given to them by the United States Army?

A. To the best of my knowledge, they have.

Q. Are they subject to the control of the United States Army officers, either stationed at the plant or in charge of the vicinity?

A. I have been informed that that is true.

Q. Do these men receive their pay from the Company or from the United States Army?

12 A. From the Company.

Q. Is the Company able to discharge these men, if they are not suitable?

A. So far as I know, they are.

Q. Does the Company consult with the officers of the United States Army before it discharges any of these men, if it does discharge any?

A. I haven't any personal knowledge of a discharge case since the Army has gone in. Now, whether the chief would consult with the Army in that respect, I wouldn't know.

Q. But your feeling is, your knowledge is that these men are what is commonly called "auxiliary military police" and in the Otis Works of the Company are controlled, handled, paid, and in every other way treated as auxiliary military police are treated in other plants?

A. Not being familiar with how military police are treated in other plants, I am afraid I couldn't answer the question.

Q. By that I mean, are these men to your knowledge sworn as auxiliary military police, subject to the control of the Army?

A. Yes.

Q. And their sole duty is the protection of the plant property in addition to their regular duties as plant protection, consideration the fact that the plant is a war production plant?

A. That's right.

Q. Now, in this category of employees, we have two firemen. Do you know what the duties of these firemen are?

A. Yes, sir.

Q. Will you state them, please?

A. Throughout the plant we have fire equipment, hose and fire equipment, wagons; these two firemen, one located at the Lakeside Works and one at our Riverside Works, have the job of keeping this equipment in as thorough—in condition; the extinguishers filled, the hose in good shape and so on and so forth.

Q. Now, in this category of employees, there are also

13 two dump laborers; do you know what their duties are?

A. Yes.

Q. Will you tell us what they are, please?

A. We have a section of the plant where refuse from the plant is dumped; this section is somewhat isolated. At one time, they maintained patrol service there. Then, it was decided that that was not necessary and we put laborers on at this dump and they recover the scrap from the slag, and the refuse that is dumped over there, and pile it up, and at the same time they are theoretically watching that section of the plant. They are really in no

sense watchmen, but they have been inherited by the police department by reason of that connection that they are just simply under the police department.

Q. Do they receive their orders from the police deparment?

A. That's right.

Q. The police department tells them when to go to work and what to do, and all those things?

A. Yes, sir.

Q. Now, I notice that in this category there are eight lieutenants and two captains. Are these the lieutenants and the captains who have control of and issue orders to the patrolmen, the firemen, and the dump laborers that we have been speaking about?

A. The two captains are the two men who are in charge of the fire equipment, one being at Riverside and one at Lakeside.

Q. Then the two fire captains are the same people as are also called the two firemen; is that right?

A. Except that they are supervisors?

Q. They are supervisors?

A. Yes.

Q. And the lieutenants are in charge of the police; is that correct?

A. That's right.

Q. Now, is there someone in charge of this whole set up other than the ones we have listed here in the stipulation?

A. Yes, we have a chief or plant warden.

14 Q. Do his duties include other duties than looking after these men? Does the plant warden have other duties than the control of police and fire departments?

A. I would say that is at least his major duty.

Q. His major duties?

A. Yes; he may be used for other purposes, but that would be his major duty.

Trial Examiner PLOST. That is all, thank you very much.

I would like to, Mr. Examiner, help a little bit with the questions which you asked Mr. Mumper in connection with the discharge of guards, and the relations to the military police, and I would like to read a couple of paragraphs from the Articles of War, which I think would answer that somewhat.

Trial Examiner PLOST. If you will just read them into the record, we will have them there and it will be very helpful.

Statement of Mr. Blank

Mr. BLANK. I don't think that there is any question at all that our police captain could discharge any of these people that have been sworn in as United States Army Auxiliary Police without

first having the sanction of the head of the military police in his district, for this reason, and I am quoting from Article 28 of the Articles of War: "Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty to shirk important service, shall be deemed a deserter."

And also Article 58, on desertion: "Any persons subject to military law who deserts or attempts to desert the service of the United States, shall, if the offense be committed in time of war, suffer death or other punishment as a court martial may direct, and if the offense be committed at any other time, such punishment excepting death that a court martial may direct."

In other words, unless the head of the military police knew that this man was being relieved of duty, they might pick him up as a deserter, so I think it would be very important that that man be dropped through the regular personnel records of the military police.

Trial Examiner PLOST. Is there anything else you want to state to clarify this situation as to the guards?

Mr. BLANK. I might read a couple of other articles from the Articles of War, just to emphasize the discipline that is necessary in handling the military police situation, and the responsibilities that are placed upon these men, not only as representatives of management, as we feel, but as representatives of the United States Army.

Article 62 reads: "Disrespect toward superior officer; any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished as a court martial may direct."

And Article 66: "Any person subject to military law who attempts to create or who begins, incites, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard or other command, shall suffer death or such other punishment as the court martial may direct."

And Article 67: "Failure to suppress mutiny or sedition; any officer or soldier who, being present at any mutiny, or sedition, does not use his utmost endeavor to suppress the same, or knowing or having reason to believe that a mutiny or sedition is to take place, does not without delay give information thereof to his commanding officer, shall suffer death or such other punishment as a court martial may direct."

I would like also to put in the record—I can't do it verbatim, but I can pretty much repeat, at least in principal, testimony of Mr. Joseph Larken, Vice President of the Bethlehem Steel Corporation, before the House Military Affairs Committee last Thursday, when discussing the question of the unionization of foremen: he made the statement that at one of their plants, the guards

had been unionized, and told of one instance where a guard found a union member asleep, belonging to the same organization and wanting to do his duty, at least so far as his responsibility to the Union was concerned, instead of reporting this man for sleeping he called up the head of the union and asked him what he should do.

The head of the union told him to forget about it. Which was done. Later, it came out that this had occurred.

I just answer that, and the Board can get the transcript for the exact wording of the testimony from the House Military Affairs Committee, to show what the implications of guards belonging to the same union as rank and file workmen might mean to discipline in a plant.

That is all I have at this time.

Trial Examiner PLOST. You made that last statement without the objection on the part of the Union; I merely wish to state that it is not appropriate at this time, and I will let it stand, however; you wouldn't care to cite the incident by page and number of the Congressional Record, and introduce the record? That would be the proper way to do this, but inasmuch as you have already made the statement without objection, I will leave it stand.

Mr. DONOVAN. Well, I want to enter an objection there, Mr. Examiner, to that last statement, because it is irrelevant and has no bearing whatsoever on this case of ours here. If I may, for the record.

Mr. BLANK. I believe I may be able to furnish you with the transcript, or at least a portion of it and the page number. It wasn't available yesterday.

Trial Examiner PLOST. Of course, you cannot do it at this time, but if you were to file a brief, it might be appropriate at that time.

Your objection will be sustained, Mr. Donovan, and I will direct that the statement made by Mr. Blank, beginning with the story of the plant guard having found a man asleep be physically expunged from the record—be stricken from the record and physically expunged from the record, except insofar as the right to cite the incident by page number in a transcript later to be used is reserved to the party.

Mr. Donovan, I understand that your Union has a contract with the Company covering certain employees of the Otis Works?

Mr. DONOVAN. We do.

Trial Examiner PLOST. Are you at this time prepared to introduce such a contract into evidence?

17 Mr. DONOVAN. I am.

Trial Examiner PLOST. Off the record.

(Discussion off the record.)

Trial Examiner PLOST. On the record. Let the record show Mr. Donovan, the representative of the Union, offers in evidence an agreement between Jones & Laughlin Corporation and the United Steelworkers of America, CIO, dated December 2, 1942. Will the reporter please mark it?

(The document above referred to was marked for identification as "CIO'S Exhibit No. 1.")

Trial Examiner PLOST. This document is marked by the reporter for identification as "CIO Exhibit No. 1," and is a printed booklet, with printed signatures, and does not purport to be the original. I will ask the Company if it has any objection to receiving this in evidence, inasmuch as it is not an original; if the Company has knowledge that this is a true copy, we may receive it.

Mr. BLANK. There is no objection, and we will certify that is a copy of the original.

Trial Examiner PLOST. CIO Exhibit No. 1 is received in evidence.

(The document heretofore marked for identification as "CIO'S Exhibit No. 1" was received in evidence.)

Trial Examiner PLOST. Mr. Donovan, in this agreement, which covers the Company's Otis Works, do you specifically omit plant-protection employees from the category?

Mr. DONOVAN. From this contract, we do. But we do feel, Mr. Examiner, that there is nothing to prevent us from going ahead with organizing this group of people and bargaining for them separately.

Not under this contract; we—I might say, for your information, that in a contract that we have with the United States Steel Corporation, the white-collar workers were eliminated. But even though that were the case, we went right ahead and organized

18 the white-collar workers, and the National Tube Company, Lorain, Ellwood City, and McKeesport signed a separate contract for that group.

Trial Examiner PLOST. Off the record.

(Discussion off the record.)

Trial Examiner PLOST. On the record. Mr. Mumper, will you please take the stand again?

* * * * * *

Examination by Trial Examiner PLOST.

Q. Mr. Mumper, you are the famous Mumper that testified a few moments ago in this proceeding regarding the guards?

A. Yes, sir.

Q. I will ask you if these guards, plant-protection employees meaning the guards and the firemen, and these two dump laborers, are carried on the Company's pay roll?

A. Yes, sir.

Q. How are they paid, on an hourly basis or on a monthly basis?

A. They are paid on an hourly rate of pay, payable every other Friday.

Q. Do they draw their pay at the same time other employees draw their pay?

A. They do.

Q. Is their pay set up and calculated and carried through the same pay roll department as it is carried—that takes care of the other employees?

A. It is.

Trial Examiner PLOST. Off the record.

(Discussion off the record.)

Trial Examiner PLOST. On the record.

By Trial Examiner PLOST:

Q. Are these employees subject to the same group benefit arrangements that are applied to other employees of the Company?

A. They are.

Trial Examiner PLOST. That is all. Do you have any questions you care to ask Mr. Mumper, Mr. Donovan?

Mr. DONOVAN. No; I have no further questions I would like to ask Mr. Mumper, no. But I would like to make a statement, if I may, for the record.

Trial Examiner PLOST. You are excused, Mr. Mumper.

Trial Examiner PLOST. Make your statement, Mr. Donovan.

Statement of Mr. Donovan

Mr. DONOVAN. That I think that owing to the fact that we are just organizing or have organized the patrolmen and they still have a captain and about eight lieutenants, I think the situation is well in hand out there, so far as supervision is concerned over their group, just as it is with the production workers and maintenance workers.

They also have ample supervision over them, and I cannot agree with Mr. Blank that if these people are permitted to belong to our Union and we are permitted to bargain for them, it is going to break down the morale of that group, because I think it is going to strengthen the morale, if anything, because after all when we are permitted to bargain for those people, we have got certain

responsibilities to assume in connection with it. We will not hesitate to assume our proper responsibilities when they are under our wing.

We have in the case of the production workers and maintenance workers, and I believe the record speaks for itself, and we will assume that same responsibility for this group. That is all.

Trial Examiner PLOST. Gentlemen, there has been filed and is part of Board's Exhibit No. 1, a statement of a field examiner concerning the claims of authorization for representation.

No further evidence regarding the claims of authorization for the purpose of representation is needed, as the statement of the field examiner is deemed by the Board to be sufficient for all purposes.

I will ask the Company if it contemplates any material change in the number of guards or plant-protection employees, firemen, and so forth, within the next 30 or 60 days. Any material change?

Mr. MUMPER. We should increase our force. We are unable to do so. The Army is after us all the time, but we have had those orders for quite some time and we have not been able to materially change the number of people.

I doubt if there is any practical difference now from what it was when those figures were submitted. The men are not available.

Trial Examiner PLOST. And probably will not be within the next 30 or 60 days?

Mr. MUMPER. No.

Trial Examiner PLOST. I will ask the Company, in the event the Board should order an election in this matter, whether the Company will cooperate with the Board in properly conducting the election, by furnishing us with the proper pay rolls and the facilities for holding an election?

Mr. BLANK. I am not prejudicing our position?

Trial Examiner PLOST. Not at all.

Mr. BLANK. But we always have—I can say that, in the past, cooperated to the fullest extent in conducting NLRB elections.

Trial Examiner PLOST: I wish to state that to the parties only in exceptional instances does the Board grant a request for oral argument before the Board itself.

I further wish to advise the parties that under Article 3, Section 9, of our Rules and Regulations, any party may file a brief with the Board within seven days after the close of the hearing, and I might state that if you find the time to be inadequate, the Board is very lenient in extending the additional time.

I will ask the parties to indicate at this time whether or not they care to file a brief, or whether, at least, they reserve the right to file a brief in this matter.

Mr. Donovan, do you care to file a brief?

Mr. BLANK. I believe we would like to file a brief, inasmuch as the part of the testimony which I offered was deleted, and I think properly so.

* * * * * *

21 *C. I. O. Exhibit No. 1*

AGREEMENT BETWEEN JONES AND LAUGHLIN STEEL CORPORATION AND THE UNITED STEELWORKERS OF AMERICA, CIO

December 2, 1942

AGREEMENT

This Agreement, dated December 2, 1942 (hereinafter referred to as the "1942 Agreement"), is between Jones & Laughlin Steel Corporation (hereinafter referred to as the "Corporation") and the United Steelworkers of America, or its successor (hereinafter referred to as the "Union") on behalf of all of the employes of the Corporation in its Pittsburgh, McKeesport, Otis and Aliquippa Works and at the Pittsburgh Warehouse.

Section 1

It is the intent and purpose of the parties hereto that this Agreement will promote economic and efficient operations of the plants, prevent strikes and other disturbances which interfere with production and thereby establish harmonious relationships between the Union and the Corporation by setting forth herein the basic Agreement covering rates of pay, hours of work and conditions of employment to be observed between the parties hereto.

The term "employe," as used in this Agreement, shall not include Foremen or Assistant Foremen in charge of any classes of labor, watchmen, salaried employees and nurses. A list of the occupations excluded by this Section will be provided the Union at each plant of the Corporation within sixty (60) days of the effective date of this Agreement. Any dispute in regard to such list may be subject to adjustment in accordance with the provisions of Section 7.

For the purposes of this Agreement, Foremen and As-
22 sistant Foremen shall be those who qualify for exemption under the provisions of the Fair Labor Standards Act as specified in the Administrator's Interpretative Bulletin effective October 24, 1940 and further provided that it shall not be the

policy of the Corporation to have Foremen or Assistant Foremen displace employes.

Section 2—Recognition

A. The Corporation recognizes the Union as the exclusive collective bargaining agency for all of its employes, except those holding positions on the excluded list referred to in Section 1. The Corporation recognizes and will not interfere with the right of its employes to become members of the Union. There shall be no discrimination, interference, restraint or coercion by the Corporation or any of its agents against any members because of membership in the Union. The Union, its members and agents, agrees not to intimidate or coerce employes into membership and also not to solicit membership on Corporation time or plant property.

B. In accordance with the Directive Order of the National War Labor Board in Case No. 485, dated November 30, 1942, the following provisions are included in this Agreement:

"In order to secure the increased production which will result from greater harmony between workers and employers and in the interest of increased cooperation between union and management, which cannot exist without a stable and responsible union, the parties hereto agree as follows:

"All employees who, 15 days after the date of the Directive Order of the National War Labor Board in this case are members of the union in good standing in accordance with the constitution and bylaws of the union, and those employees who may thereafter become members shall, during the life of the agreement as a condition of employment, remain members of the union in good standing.

23 "The Company, for said employees, shall deduct from the first pay of each month the union dues for the preceding month of one dollar ($1.00)[1] and promptly remit the same to the International Secretary-Treasurer of the union. The initiation fee of the union of three dollars ($3.00) shall be deducted by the Company and remitted to the International Secretary-Treasurer of the Union in the same manner as dues collections.

"The Union shall promptly furnish to the National War Labor Board and to the company a notarized list of members in good standing 15 days after the date of the Directive Order. If any employee named on that list asserts that he withdrew from membership in the union prior to that date and any dispute arises, the assertion or dispute shall be adjudicated by an arbiter ap-

[1] At the Otis Works the monthly dues shall be one dollar and twenty five cents ($1.25) when and if so approved by the National War Labor Board

pointed by the National War Labor Board whose decision shall be final and binding upon the union and the employee.

"The Union agrees that neither it nor any of its officers or members will intimidate or coerce employees into membership in the union. If any dispute arises (as to whether there has been any violation of this pledge or whether any employee affected by this clause has been deprived of good standing in any way contrary to the constitution and bylaws of the union) the dispute shall be regarded as a grievance and submitted to the grievance machinery and, if necessary, to the final determination of an arbitrator appointed by the National War Labor Board in the event that the collective-bargaining agreement does not provide for arbitration."

The Union shall indemnify, defend, and save the Corporation harmless against any and all claims, demands, suits, or other form of liability that shall arise out of or by reason of action taken or not taken by the Corporation in reliance upon certified lists furnished it by the Union or for the purpose of complying with any of the provisions of this Section.

Section 3—Wages

Effective February 15, 1942, there shall be an increase in wages of five and one-half cents (5½c) per hour which will make the new common labor rate 78c per hour or $6.24 per eight hour day.

The increase of five and one-half cents (5½c) per hour shall be paid in the same manner as the ten cents (10c) per hour increase of April 1, 1941; namely, by adding an additional five and one-half cents (5½c) per hour to the wage scale of March 31, 1941.

Rates now in effect and as increased as above provided, shall remain in effect for the duration of this Agreement, except as changed in accordance with the provisions of Section 11.

The Corporation agrees that, when so requested by the Union, it will eliminate Pay Period Pooling of earnings resulting from piecework or straight tonnage rates and substitute therefor daily computation of earnings which shall be not less than the guaranteed occupational hourly rate or seventy-eight cents (78c), whichever is the greater, multiplied by the number of hours worked by the employe on that day.

The above conversion shall be based upon the premise that the wage costs to the Corporation for each of the concerned occupations will not be substantially increased.

Trade apprentices in any plant of the Corporation shall receive not less than the minimum common labor rate for each hour worked during the first period of the trade apprentice training program.

Women employed to perform work on jobs heretofore performed by men shall receive the same pay for fully performing the same quantity and type of work. Any such jobs with respect to which either party may allege wage rate inequalities shall be subject to the provisions of Section 11.

Section 4—Hours of Work

A. This Section is intended to provide a basis for calculating overtime and shall not be construed as a guarantee of hours of work per day or per week.

B. (1) The normal work day shall be any regularly scheduled consecutive twenty-four (24) hour period comprising eight (8) consecutive hours of work and sixteen (16) consecutive hours of rest except for such rest periods as may be provided in accordance with practices heretofore prevailing in the plants of the Corporation; and the normal work week shall be five (5) consecutive work days followed by two (2) consecutive rest days within seven (7) consecutive days. A week shall consist of any seven (7) consecutive days regularly used by the Corporation for the determination of the pay of employes.

(2) If in Management's opinion it is necessary to establish schedules departing from this intent, the grievance committee of the plant and the management of the plant may, at the request of either party, confer to determine whether, based upon the facts of the situation, mutually satisfactory modified schedules can be arranged. It is agreed by both parties that diligent effort on the part of Management should result in not less than 85 per cent of all employees being scheduled on the normal work week (including those working on agreed-to schedules) as stated above and Management further agrees to furnish the grievance committee in each plant evidence of its performance in this respect from time to time as may be desired by the grievance committee.

(3) When less than four (4) hours are worked in any one day, such time is to be disregarded in the calculation of premium time for sixth and seventh day. However, should the aggregate number of hours worked during the calendar week exceed forty (40), time and one-half will be paid for all excess hours over forty (40).

C. (1) Hours worked in excess of eight (8) consecutive working hours or in excess of a total of forty (40) in a work week, or
26 days worked in excess of five (5) work days within the work week shall be paid for at one and one-half times the normal rate of pay.

(2) Overtime payment shall be made on the basis of either daily or weekly overtime hours worked, but an employee shall not be

paid both daily and weekly overtime for the same overtime hours worked.

D. Determination of the starting time of the daily and weekly work schedules shall be made by the Corporation and such schedules may be changed by the Corporation from time to time to suit varying conditions of the business; provided, however, that indiscriminate changes shall not be made, in such schedules and provided, further, that changes deemed necessary by the Corporation shall be made known to the plant representatives of the Union as far in advance of such changes as is possible.

E. Employees who are scheduled, and who report for work shall be paid, in the event no work for which they were scheduled is available, for two hours' work at the occupational rate of the occupation at which they were scheduled. At Management's discretion, the employees scheduled or notified to report may be assigned to other work for which they may be qualified in lieu of their being released. If an employee is assigned to a higher rated job, he shall be paid the higher rate. If an employee is assigned to work beyond the two hours, he shall be paid the occupational rate of the job to which assigned. In case an employee does not work the two hours but is paid for same, the two hours shall be considered allowed time and shall not be used in overtime calculation, but the fact that he is paid the two hours shall not prevent him from working a full forty (40) hour week at regular rates of pay.

F. Employees who are scheduled and report and actually begin work on the job for which scheduled at the start of a turn and through no fault of their own work less than four (4) hours, shall be paid for a minimum of four (4) hours at their occupational rate. If the employee works only a part of this four hours, the unworked part shall be considered as allowed time and shall not be included in overtime calculation.

27 G. The foregoing payments (E-F) shall be either at the regular or overtime rates depending upon whichever pertains in accordance with the provisions of this Section.

H. The provisions of subsection "E" and "F" will not apply in the event that strikes, stoppages in connection with labor disputes, fires, storms, floods, power or mechanical failures or other conditions over which the employer has no control, interfere with work being provided.

J. The scheduling practices now in effect at the various plants shall remain in effect.

(Note: It is agreed that nothing contained herein is intended to waive the rights of either the Corporation or the Union in respect to Presidential Executive Order No. 9240, or interpreta-

tions thereof by the United States Department of Labor, so long as such Order is in effect.)

Section 5—Vacations[3]

I. Purpose

The purpose of this Plan is to promote good will by providing vacations with pay for wage earner employes in recognition of their regular and continuous service over a number of years, and to enable those employes who qualify to enjoy a period of rest.

II. Eligibility

Each employe who, prior to July 1, 1943, and each succeeding calendar year during the continuance of this Agreement, has been continuously in the employ of the Corporation for three (3) or more years shall receive one (1) week's vacation with pay, and each employe who has been continuously in the employ of the Corporation for fifteen (15) or more years shall receive two (2) weeks' vacation with pay. It is agreed that the computation of length of continuous service shall be based on the Jones
28 & Laughlin Steel Corporation Pension Fund Rules for service continuity for all service up to and including April 30, 1941, which service shall be the total accumulated service as of that date and as provided under the Pension Fund Rules referred to above. Effective April 1, 1941, continuous service credit will be computed in accordance with Item III (Continuous Service) hereof. In addition to such service eligibility, each employe must have received earnings in at least sixty percent (60%) of the pay periods between July 1, 1942, and July 1, 1943.

III. Continuous Service

A. Continuous service shall be determined by the employe's first employment in any plant of the Corporation.

B. There shall be no deduction for any time lost which does not constitute a break in continuity of service.

C. Continuous service is broken by:

1. Voluntary quitting the service.

2. Termination due to discharge for cause, suspension or Leave of Absence, any of which continues for more than six (6) months.

3. Absence due either to lay-off or to disability, or both, which continues for more than two (2) years; provided, however, that employes injured while on duty shall accumulate credit for con-

[3] This vacation section does not apply to the Otis Works. At the Otis Works, the vacation plan in effect for 1942 by the Otis Steel Company shall remain in effect during the life of this Agreement.

tinuous service until termination of the period for which statutory compensation is payable and further provided that the employe returns to work as soon as he is physically able to do so.

4. Failure of employees on lay-off due to level of operations to report to Employment Office within five (5) days of registered mail notice. Ten days' time will be provided for men living outside the district at the time.

5. New employes and those hired after a break in continuity of service will be regarded as probationary employes for the first ninety (90) days of their employment and will receive no
29 continuous service credit during such period. During this period of probationary employment, probationary employes may be laid off or discharged as exclusively determined by Management; provided, that this will not be used for purposes of discrimination because of membership in the Union. Probationary employes continued in the service of the Corporation subsequent to ninety (90) days from date of original hiring shall receive full continuous service credit from date of original hiring.

6. Absence due to sickness, if the employe does not periodically (every thirty (30) days) report his status to the Employment Department or have an excuse for not so reporting that is satisfactory to Management.

IV. Length of Vacations

1. A one (1) week's vacation shall consist of seven (7) consecutive days and a two (2) weeks' vacation of fourteen (14) consecutive days.

2. One week's vacation must be taken in a continuous period but, two weeks' vacation may, if the employe and Management agree, be divided into two periods of one week each.

V. Vacation Season

1. The vacation season shall be from April 1 to December 31, and vacation shall be forfeited if not taken within that period unless the employe presents a grievance prior to December 15. Vacations will, so far as possible, be granted at times most desired by employes; but the final right to allotment of vacation period is exclusively reserved to the Corporation.

2. If, in the opinion of the Management, the Vacation Program would interfere with the attainment of desired production, at the option of the Corporation any eligible employe may be required to continue work and receive vacation pay in lieu of actual vacation from work. However, it is the intent that to the greatest degree possible, eligible employes shall receive the benefits of vacation from work.

VI. Vacation Wages—How Paid

1. Vacation wages will be paid in advance.

2. Employes who do not receive their vacation wages at the time of taking vacations, or employes who are required to work in lieu of a vacation, shall be given their vacation allowance immediately preceding December 25, unless the employe requests payment at an earlier date.

VII. Number of Hours to Be Paid For

Employes granted vacation shall be paid, per week, a minimum of forty (40) hours of wages and a maximum of forty-eight (48) hours of wages based on the average number of hours worked per week as indicated by the first two pays received in March.

VIII. Rate Per Hour

1. Employes granted vacations will be paid at their average rate of earnings per hour as indicated by the first two pays received in March.

2. The average rate of earnings per hour is construed to mean the wage earner employe's rate per hour based on the number of hours paid for.

3. If rehired employes are eligible for vacations due to previous service, the vacation pay will be calculated on the basis of their rate of pay during the last two pay periods in which they had earnings.

IX. Employes Entering Military Service

1. Employes who enter military service and are eligible for vacation during the calendar year in which they enter such service shall receive the amount of their vacation pay as shown on the wage earners' vacation payroll, provided this payroll has been prepared. In the event they enter military service before the vacation payroll is prepared, they will receive vacation pay based on their average rate of earnings per hour during the two pay periods closed and calculated prior to their date of leaving the service of the Corporation.

2. Employes who enter military service shall be con-
31 sidered as complying with the ruling that they must have worked in sixty per cent (60%) of the pay periods between July 1, 1942 and July 1, 1943, if they have received earnings in 60% of the pay periods between July 1, 1942, and the date ordered to report for induction.

3. Employes who volunteer for military service while on an occupational deferment granted by their draft board, shall not be granted their vacation allowance.

X. General Regulations

1. Vacations shall be arranged in advance and an employe shall not be permitted to trade his vacation privilege for an unauthorized absence taken in advance of the vacation period assigned him.

2. A vacation may be re-scheduled for another date, or granted in case of sickness or other physical disability, but no time allowance will be made for sickness or other incapacity occurring during the vacation.

3. Employes who voluntarily quit their employment shall not be entitled to vacation allowance.

Section 6—Seniority

It is understood and agreed that in all cases of promotion or increase of forces, length of continuous service shall prevail only if ability to perform the work is relatively equal. In cases of demotion and decrease of forces, length of continuous service shall prevail unless an involved employe is possessed of exceptional ability that should be given additional consideration.

Determination of plant units to which the above factors shall be applied shall be on a job and departmental basis and the details of same shall be worked out by agreement between the plant Management and the grievance committee at each plant with the proviso that the present practice at the several plants shall be continued. The rules governing "Continuity of Service" as specified in Section 5 hereof shall be followed in determining continuous service.

When an employee is reprimanded or suspended, he shall be given a copy of the Suspension Reprimand Notice and
32 another copy will be placed in his permanent employment record.

Employes desiring a transfer from one department to another or one plant to another shall arrange same through their respective employment offices and practices governing same shall continue as now in effect.

Leaves of Absence, when granted, shall be at the sole discretion of Management and the usual duration of a Leave shall be for thirty (30) days, renewable on application and for just cause in thirty (30) day periods to a maximum of 180 days.

In decrease of forces, due to depression, and after the passage of two pay periods, or more as may be mutually agreed upon between plant Management and the Union, probationary employes will be removed before regular employes have their normal work week reduced. Thereafter work will be shared until the remaining employes are averaging, for two pay periods, less than three

(3) days per week, at which time forces will be further reduced. This rule shall constitute a general standard, variations of which may be worked out as mutually agreed upon by plant Management and the Union.

Lines of natural job progression now in effect in the various plants shall be continued and every reasonable effort shall be made to mutually agree on same in places where they do not now exist.

The seniority standings of employes in a given department shall be kept on file in that department.

Section 7—Adjustment of Grievances

Should any difference arise between the Corporation and the Union or any employe of the Corporation as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise in any plant, there shall be no suspension of work on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner:

First, between the employe, with or without his grievance
33 committeeman or assistant grievance committeeman present, and the foreman of the department involved;

Second, between a member or members of the grievance committee, designated by the Union and the superintendent of the department;

Third, between a member or members of the general grievance committee, designated by the Union, and the General Superintendent or his designated representative;

Fourth, between the representatives of the National Organization of the Union and the representatives of the executives of the Corporation; and

Fifth, in the event the dispute shall not have been satisfactorily settled, the matter shall then be appealed to an impartial umpire to be appointed by mutual agreement of the parties hereto. The decision of the umpire shall be final. The expense and salary incident to the services of the umpire shall be paid jointly by the Corporation and the Union.

The above procedure shall be available to either the Corporation or the Union.

It is the purpose of this Section to provide procedure for prompt, equitable adjustments of alleged grievances and represents a general standard which may be modified, when plant management and the Union agree that modifications would be in the interests

of all concerned and provided such modifications are not in violation of this Agreement.

Grievances are to be processed through Step 4 within forty-five (45) days from the date of presentation of written grievance unless by mutual agreement, the time limit on any case or cases is extended.

It is agreed that the various works will be divided into zones, as mutually agreed upon by the Plant Management and the Union.

The actual number of members of the grievance committee at each works shall be mutually agreed upon between the General Superintendent of the Works and the Union, and in no case shall there be more than one grievance committeeman in any department. Each grievance committeeman may, if the local Union so elects, appoint one assistant grievance committeeman to cover each turn on which he does not work. Such assistants, to a maximum of three per zone, shall be provided the same treatment as grievance committeemen except that they may handle grievances only in the first step of the grievance procedure.

34

Only employes of a plant may serve as grievance committeemen or assistant grievance committeemen for that plant. The Union shall certify to the Corporation the names of the employes it designates as grievance committeemen and assistant grievance committeemen, and those so certified will be afforded, with approval of supervision, such time off, without pay, as may be required to conduct legitimate Union business, except that witnesses called in by the Corporation shall be paid by the Corporation.

It is agreed that each local Union may, if it so elects, designate one grievance man per local Union to serve as a general grievance committeeman (except the Aliquippa Local Union shall be permitted two general grievance committeemen). The general grievance committeemen shall assist zone committeemen in settling grievances and shall act as the Union representatives in the third step of grievance procedure.

In the event that a grievance arises in any zone concerning an employee or group of employees and a satisfactory settlement has not been reached with the foreman, it shall then be the privilege of the aggrieved employee or employees, with the zone committeeman, to take up the grievance in Step two (2) of the grievance procedure.

The zone committeeman or the general grievance committee shall prepare a Statement of Complaint on a Union form, properly filled out and indicating the section of the Agreement under which the case is to be processed, which will then be presented to the department superintendent. Arrangements will be made to discuss the case as soon as possible. Subsequent to this discussion,

the department superintendent will give the zone grievance committeeman a written answer.

35 Where a grievance has been answered by the superintendent in any department and the answer is not satisfactory to the grievance committee, it may be appealed to the General Superintendent of the Works or his designated representatives. The general grievance committee and the General Superintendent or his designated representatives shall hold joint meetings as often as they mutually deem necessary to hear cases appealed to them. Preceding these meetings the general grievance committee shall present to the General Superintendent, or his designated representatives, a list of the grievances to be discussed. In cases of discharge or other grievances that cannot be reasonably delayed, they shall be taken up at a special meeting to be properly arranged in advance with the General Superintendent, or his designated representatives, by the general grievance committee.

In cases where no agreement has been reached by the general grievance committee and the Works Management, they may then be appealed to the National Representative of the Organization and the executives of the Corporation and completed in accordance with the Agreement.

When the general grievance committee meets with the General Superintendent, or his designated representatives, other committeemen will meet with them only on grievances pertaining to their zone.

At all grievance committee meetings with the Management, only Works' employes with grievance committee credentials from the Union will be accepted. All meetings, regular or special, between the grievance committee, or member or members thereof, various superintendents, or other representatives of the Management, shall be arranged in advance, at which time the subject, or subjects, to be discussed will be outlined.

In all grievances heard by either the department superintendent, or other representatives of the Management, and the grievance committee, or member or members thereof, it shall be admissible for either side to bring in employes of the Corporation who are involved in the grievance or who may aid in its solution. The

36 grievance committeeman, employe, or employes involved in the grievance, called in by the Union will receive no pay from the Corporation for the time involved in the hearing of the grievance.

Grievances not appealed from the decision rendered in Steps one, two, three, or four within five (5) working days from the

date of such decision shall be considered settled on the basis of the decision last made and shall not be eligible for further appeal.

Awards or settlements of grievances shall, in no case, be made retroactive beyond the date on which the grievance was officially presented to the foreman except in the case of pay shortages.

It is the purpose of this Section to provide procedure for prompt, equitable adjustment of alleged grievances. Failure to file alleged grievance complaints promptly on the occurrence or knowledge of the grievance is construed to be not consistent with the intent of this Section or of this Agreement.

The Union reserves the right to refuse to take a grievance on behalf of any employe who is not a member of the Union, and the Management may refuse to give consideration to any grievance unless it is taken up through the regular procedure.

Section 8—Management

The Management of the Works and the direction of the working forces, including the right to hire, suspend, or discharge for proper cause, or transfer, and the right to relieve employes from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Corporation: Provided that this will not be used for purposes of discrimination against any member of the Union.

Section 9—Discharge Cases

In the exercise of its rights as set forth in Section 8, Management agrees that no employe shall be peremptorily discharged from and after the date hereof, but that in all instances in which Management may conclude that an employe's conduct may justify suspension or discharge, he shall be first suspended. Such
37 suspension shall be for not more than five (5) calendar days. During this period of initial suspension the employe may, if he believes that he has been unjustly dealt with, request a hearing and a statement of the offense before his department superintendent, or the representative of the General Superintendent of the Plant with or without the member or members of the grievance committee present as he may choose. At such hearing the facts concerning the case shall be made available to both parties. After such hearing Management may conclude whether the suspension shall be converted into discharge or, dependent upon the facts of the case, that such suspension may be extended or revoked. If the suspension is revoked the employe shall be returned to employment and receive full compensation at his regular rate of pay for the time lost, but in the event a disposition shall result in either the affirmation or extension of the suspension or discharge

of the employe, the employe may allege a grievance which shall be handled in accordance with the procedure of Section 7—"Adjustment of Grievances." Final decision on all suspension or discharge cases shall be made by the Corporation within five (5) days from the date of filing of the grievance, if any. Should it be determined by the Corporation or by an umpire in accordance with Step five (5) of the Grievance Procedure that the employe has been discharged or suspended unjustly, the Corporation shall reinstate the employe and pay full compensation at the employe's regular rate of pay for the time lost.

Section 10—Safety and Health

The Corporation shall continue to make reasonable provisions for the safety and health of its employes at the plant during the hours of their employment. All reasonable protective devices, wearing apparel and other equipment necessary to properly protect employes from injury shall be provided by the Corporation in accordance with the practices now prevailing at the respective plants. Proper heating and ventilating systems shall be installed where needed.

38 Section 11—Rate Establishment and Adjustment

It is recognized that changing conditions and circumstances may from time to time require adjustment of wage rates or modification of wage rate plans because of alleged inequalities, development of new manufacturing processes, changes in the character of jobs, or mechanical improvements brought about by the Corporation in the interest of improved methods and product. Under such circumstances the following procedure shall apply:

1. When a bona fide new job or position is to be established—

a. Management will develop an appropriate rate by the regular procedure in effect in the Corporation for its industrial engineering and industrial relations activities, including the employment of job evaluation, and in the case of incentive rates the application of accepted industrial engineering methods.

b. Such procedure having been conformed to, the rate may be established by Management to cover the job or position in question. The Union grievance committeeman or committeemen representing the employe or employes to be affected shall be informed by Management in advance concerning such rates. The rate having been established may subsequently be subject to adjustment as provided in Paragraph "c" below.

c. If, after a reasonable trial period following the establishment by Management of the rate or rates for new jobs or positions, grievances are alleged by either employes or Management concerning such rates—which grievances cannot be satisfactorily adjusted by mutual agreement—the question as to the equity of such rates in relation to the plant rate structure and the requirements of the job or position as established by sound industrial engineering procedures may be appealed to an impartial umpire in accordance with the provisions of Section 7 (Adjustment of Grievances), but no formal grievance may be presented under Section 7 until a reasonable period has elapsed since the installation of the rates and the operation of the equipment to which the new rates apply, which period will permit of study and adjustment, if necessary, of the rates to the varying conditions of operation attendant upon the establishment of the new operation to which the new jobs or positions apply. It is recognized that the term "reasonable period" may vary with the type of operation or equipment to which the new rates apply, but shall not be construed to apply to a period less than two (2) pay periods or in excess of six (6) pay periods unless otherwise mutually agreed.

2. Where alleged inequalities in wage rates prevail, the matter may be taken up for local Works adjustment and settlement made on a mutually satisfactory basis; provided, however, that grievances arising under this paragraph may not be processed beyond Step four of Section 7 hereof. This subsection is without prejudice to the rights of either the Corporation or the Union to submit cases arising hereunder to the National War Labor Board.

3. When technological changes are made in equipment, method of processing, material processed, or quality or production standards which would result in a substantial change in the character of the job, job duties or requirements; or where over a period of time an accumulation of minor changes of this type have occurred which, in total, have resulted in a substantial change in the character of the job, job duties or requirements, adjustments of hourly, incentive, and tonnage rates may be required. In such cases, Management may establish the new rates and the Union, if dissatisfied, may allege a grievance and carry it through all steps of the contract procedure established for the settlement of grievances for determination as to whether the earnings received by the employe from the new rates have resulted in a lowering of the rates applicable to him under Section 3 of this Agreement or failure to provide proper compensation for such increased effort, if any, brought about by the change in the job duties or requirements.

ion 12—Holidays

The following days shall be considered as holidays: Independence Day, Labor Day, Christmas.

On these holidays there shall be no regular production work except in cases of continuous operations; provided, however, that so long as the present war emergency exists, and in view of the government's request for all possible production, the Corporation will pay all employes at the rate of one and one-half times their normal regular rate of pay for hours worked on these holidays.

The term "continuous operations" applies to those departments which normally operate 24 hours per day, seven days per week and which cannot readily be suspended. Practices in regard to "continuous operations" shall be continued as at present in the various plants of the Corporation.

If, by reason of holiday observance, an employe otherwise scheduled to work on the day on which such holiday occurs is not required to work on that day, but is required to work what would have been his sixth day of work had he worked on such holiday, he shall be paid at the rate of time and one-half his regular rate of pay for hours worked on such day; where such hours are worked by mutual agreement between plant management and the grievance committee, the regular rate of pay shall apply.

The Corporation agrees to recognize Thanksgiving, New Year's Day and Memorial Day as additional holidays in compliance with the provisions of Presidential Executive Order No. 9240, dated September 10, 1942, so long as such Executive Order No. 9240 remains in effect.

Section 13—Prior Agreements

This Agreement shall supersede all existing and previous agreements. All local rules, regulations and customs heretofore established in conflict with this Agreement are hereby abolished, but prior practice and custom not in conflict with this Agreement may be continued.

41 No grievances which arose prior to the date of this 1942 Agreement shall be taken up for adjustment except that grievances which as of the date of the 1942 Agreement have been appealed in writing from a decision in the prior steps of the grievance procedure defined in the prior agreements or are in the process of being adjusted must be considered under the procedures of Section 7 of the 1942 Agreement and be determined in accordance with the applicable provisions of the 1942 Agreement.

Section 14—Military Service

Any employe, except a temporary employe, who is inducted into the land or naval forces of the United States or any employe who volunteers for enlistment and is granted a Special Military Leave of Absence and who makes application for re-employment within forty (40) days after he is first honorably discharged from service, shall be re-employed on the basis of his accumulated seniority; provided he is able to do the work and his work is available. While such employe is in the armed service of the United States, he shall continue to accumulate seniority as though in the active employ of the Corporation, and upon return to employment, shall be eligible for vacation due him on the basis of this accumulated seniority and in conformity with Section 5 hereof.

If an employe so applying for re-employment shall so request, he shall be granted a leave of absence without pay, not to exceed sixty (60) days before he shall return to work.

Section 15—Termination date

The terms and conditions of this Agreement shall continue in effect until changed or terminated, as follows:

a. Either party may at any time and from time to time give ten (10) days' written notice to the other party of the time for the commencement of a conference of the parties for the purpose of negotiating the terms and conditions of a change of the 1942 Agreement, which conference shall be at the office of
42 the Corporation in Pittsburgh, Pennsylvania, unless otherwise mutually agreed, and

b. If, because of failure to agree the 1942 Agreement is not changed by a written agreement entered into by the Corporation and the Union within thirty (30) days from the giving of said notice, then the 1942 Agreement and all of the provisions thereof, shall terminate upon the expiration of forty days from the giving of said notice.

Notice hereunder shall be given by registered mail, be completed by and at the time of mailing, and if by the Corporation, be addressed to United Steelworkers of America, Commonwealth Building, Pittsburgh, Pennsylvania, and if by the Union, be addressed to the Corporation at Jones & Laughlin Building, Pittsburgh, Pennsylvania. Either party may, by like written notice, change the address to which registered mail notice to it shall be given.

Signed this eleventh day of December 1942.

Jones & Laughlin Steel Corporation, by S. S. Marshall, Jr., Vice President, by E. F. Blank, Director of Personnel Relations; United Steelworkers of America, by Philip Murray, President; by David J. McDonald, Secretary-Treasurer, by Frank Burke, Director, District 16,
43 by John Grecula, Director, District 14, by Bert Hough, Director, District 20, by William F. Donovan, Director, District 28, by Clifford J. Shorts, International Representative, by Joseph Krivan, Representative, by Leo E. Casey, Representative; by Thomas P. McNamara, Local Union No. 185, by Thomas Gorman, Local Union No. 186, by Jack Ferline, Local Union No. 187, by William F. Krupp, Local Union No. 188, by Wilbur R. Eaton, Local Union No. 1257, by Jos. Roy Murray, Local Union No. 1843, by John T. Armstrong, Local Union No. 1843, by Sam Bielich, Local Union No. 1272, by Fred Skiles, Local Union No. 1272, by John T. Atkinson, Local Union No. 1211, by Michael Katchur, Local Union No. 1211, by Edward C. Hoffman, Local Union No. 2587, by Thomas J. Hickey, Local Union No. 2587.

44 Before National Labor Relations Board.

Report on ordered election

—— Filed May 31, 1943

Election Held May 26, 1943, at Cleveland, Ohio

Pursuant to the Rules and Regulations of the National Labor Relations Board (herein called the Board), the undersigned hereby reports that the election heretofore directed by the Board in the above-entitled case was conducted in accordance with the notice of election attached hereto and with the following results:

Approximate number of eligible voters	56
Count of Ballots:	
Total ballots cast	52
Total ballots challenged	None
Total void ballots	None
Total valid votes counted	52
Votes cast for United Steelworkers of America (CIO)	37
Votes cast against United Steelworkers of America (CIO)	15

The counting and tabulating were fairly and accurately done. Statements to such effect from the observers to the election are on file.

The Undersigned finds that United Steelworkers of America (CIO) has been designated and selected by a majority of the employees in the bargaining unit found by the Board in its De-

cision in this proceeding to be appropriate and recommends that the Board so certify.

Dated at Cleveland, Ohio, this 27th day of May 1943.

(S) WALTER E. TAAG,
Regional Director,
National Labor Relations Board.

47 Before the National Labor Relations Board

Certification of representatives

Issued June 5, 1943

On May 26, 1943, pursuant to the Decision and Direction of Election issued by the Board herein on May 8, 1943,[3] an election by secret ballot was conducted under the direction and supervision of the Regional Director for the Eighth Region (Cleveland, Ohio). Thereafter, on May 27, 1943, in accordance with the Rules and Regulations of the Board, a Report on Ordered Election was issued and served upon the parties. No objections to the said report, or to the conduct of the ballot, have been filed by any of the parties. The report shows as follows:

Approximate number of eligible voters	56
Total ballots cast	52
Total ballots challenged	0
Total void ballots	0
Total valid votes counted	52
Votes cast for United Steelworkers of America (CIO)	37
Votes cast against United Steelworkers of America (CIO)	15

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Sections 9 and 10, of National Labor Relations Board Rules and Regulations—Series 2, as amended.

It is hereby certified that the United Steelworkers of America (CIO) has been designated and selected by a majority of all patrolmen, watchmen, and firemen, including dump laborers employed by the Jones & Laughlin Steel Corporation at its Otis Works, Cleveland, Ohio, but excluding lieutenants, captains, and supervisors, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act, the said organization is the exclusive representative of all such

[3] 49 N. L. R. B., No. 50.

employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Washington, D. C., this 5th day of June 1943.

[SEAL]

HARRY A. MILLIS,
Chairman,
GERARD D. REILLY,
Member,
JOHN M. HOUSTON,
Member,
National Labor Relations Board.

Case No. 8–C–1548

Before the National Labor Relations Board, Eighth Region

Case No. 8–C–1548

In the Matter of JONES AND LAUGHLIN STEEL CORP., *and* UNITED STEELWORKERS OF AMERICA (CIO)

Complaint

Issued September 16, 1943

It having been charged by the United Steelworkers of America, affiliated with the Congress of Industrial Organizations, hereinafter called the Union, that Jones & Laughlin Steel Corporation, hereinafter called the Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, 49 Stat. 449, hereinafter referred to as the Act, the National Labor Relations Board, by its Regional Director for the Eighth Region, as agent for the National Labor Relations Board, designated by the National Labor Relations Board Rules and Regulations, Series 2, as amended, hereby issues its Complaint and alleges the following:

1. Respondent is and has been for a long period of time a corporation organized under and existing by virtue of the laws of the State of Pennsylvania, having its principal office in the City of Pittsburgh, Pennsylvania, and operating plants in the City of Cleveland, Ohio, known as the Otis Works, and plants at Pittsburgh, Pennsylvania, and Aliquippa, Pennsylvania, and now and for some time past has been continuously engaged in the production, manufacture, sale, and distribution of iron and steel products.

2. Respondent, in the course and conduct of its business, causes and has continuously caused over a long period of time a sub-

stantial part of the coal, limestone, ore, and other materials used in the manufacture of its products to be purchased and transported in interstate commerce from and through states of the United States other than the States of Ohio and Pennsylvania, to its plants in the States of Ohio and Pennsylvania, and causes and has continuously caused over a long period of time a large part of the products manufactured by it to be sold, shipped and transported in interstate commerce from its plants in the States of Ohio and Pennsylvania to, into and through states of the United States other than the States of Ohio and Pennsylvania.

3. Respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

4. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

5. All patrolmen, watchmen, and firemen, including dump laborers, employed by the Respondent at its Otis Works, Cleveland, Ohio, but excluding lieutenants, captains, and supervisors, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act, as found by the National Labor Relations Board in the matter of Jones & Laughlin Steel Corporation, Otis Works, and United Steelworkers of America (CIO), Case No. R-5143, decided May 3, 1943.

6. Since on or about May 26, 1943, and at all times thereafter, a majority of the employees in the aforesaid appropriate unit have designated and selected the Union as their representative for the purposes of collective bargaining with Respondent, such designation and selection having been made pursuant to an election by secret ballot directed by the National Labor Relations
51 Board in the aforesaid Case No. R-5143, and conducted under the supervision of the Regional Director for the Eighth Region of the National Labor Relations Board on May 26, 1943.

7. On June 5, 1943 the National Labor Relations Board, by virtue of and pursuant to the power vested in it by Section 9 (c) of the Act, and pursuant to Article III, Sections 9 and 10 of the National Labor Relations Board Rules and Regulations, Series 2, as amended, certified that the Union had been designated and selected by a majority of all the employees in the aforesaid appropriate unit as their representative for the purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act, the said Union was the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment. At all times since the said certification the Union has been, and continues to be, the exclusive representative of all the employees in the aforesaid appro-

priate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

8. Since on or about May 28, 1943, and at all times thereafter, the Union, by its officers, agents, and representatives, requested the Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other conditions of employment with the Union as the exclusive representative of all the employees in the aforesaid appropriate unit.

9. Respondent, by its officers, agents, and representatives, while engaged as described above, has refused to recognize and accept as appropriate the aforesaid unit found by the National Labor Relations Board to be an appropriate unit as set forth in Paragraph 5, above, and has, since on or about June 23, 1943, and at all times thereafter, failed and refused and continues to fail and refuse to recognize the Union as the exclusive representative of its employees in the aforesaid appropriate unit, and has, since on or about June 23, 1943, and at all times thereafter, failed and refused and continues to fail and refuse to bargain with the Union with respect to rates of pay, wages, hours of employment, and other conditions of employment.

10. By the aforementioned acts of Respondent, acting through its officers, agents, and representatives, and by each of them, as alleged and set forth in Paragraph 9, above, Respondent did refuse and continues to refuse to bargain collectively with representatives of its employees, and by all of the said acts and by each of them did engage in and is now engaging in unfair labor practices within the meaning of Section 8 (5) of the Act.

11. By the aforementioned acts of Respondent, acting through its officers, agents, and representatives, and by each of them, as alleged and set forth in Paragraph 9, above, Respondent did interfere with, restrain and coerce, and is now interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and by all of the said acts, and by each of them, has engaged in and is now engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

12. The acts and conduct of Respondent, as alleged and set forth in Paragraphs 9, 10 and 11, above, occurring in connection with the operations of Respondent, as set forth and described in Paragraphs 1 and 2, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

13. The acts and conduct of Respondent, as alleged and set forth in Paragraphs 9, 10 and 11, above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7), of the Act.

Wherefore, the National Labor Relations Board, on this 16th day of September 1943, issues this, its Complaint,
53 against the Jones & Laughlin Steel Corporation, Respondent herein.

WALTER E. TAAG,
Regional Director,
National Labor Relations Board, Eighth Region.

Before National Labor Relations Board

Notice of hearing

Please take notice that on the 28th day of September 1943, at 10:00 a. m., Eastern War Time, at 702 Public Square Building, Cleveland, Ohio, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that you have the right to file with the Regional Director for the Eighth Region, with offices at 713 Public Square Building, Cleveland, Ohio, acting in this matter as agent of the National Labor Relations Board, an answer to the said Complaint, within ten (10) days from the service thereof.

Please take notice that duplicates of all exhibits which are offered in evidence will be required unless, pursuant to request or motion, the Trial Examiner in the exercise of his discretion and for good cause shown, directs that a given exhibit need not be duplicated.

In witness whereof the National Labor Relations Board has caused this, its Complaint and Notice of Hearing, to be signed by the Regional Director for the Eighth Region on this 16th day of September 1943.

WALTER E. TAGG,
Regional Director,
National Labor Relations Board.

54 Before National Labor Relations Board

Answer

Sworn to September 24, 1943

Comes now Jones & Laughlin Steel Corporation, Respondent in the above-entitled proceeding and files this, its Answer to the Complaint issued on September 16, 1943, by the Regional Di-

rector for the Eighth Region (hereinafter referred to as the Director), as agent of the National Labor Relations Board (hereinafter referred to as the Board), upon charges having been filed with the Director by United Steelworkers of America affiliated with the Congress of Industrial Organizations (hereinafter referred to as the Union) alleging that the Respondent has engaged and is now engaging in certain unfair labor practices violative of the National Labor Relations Act (hereinafter referred to as the Act).

1. Respondent admits that it is incorporated under the laws of the Commonwealth of Pennsylvania, maintains its principal office in the City of Pittsburgh, Pennsylvania, has been and is now operating steel mills located at Pittsburgh, Aliquippa and McKeesport, Pennsylvania and Cleveland, Ohio, all of which are engaged in the manufacture of semi-finished and finished steel products.

2. Respondent admits that the allegations contained in Paragraph 2 of the Complaint are substantially true in fact.

3. Respondent admits that it is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

4. Respondent admits that the Union is a labor organization within the meaning of Section 2 (5) of the Act.

5. Respondent denies that all patrolmen, watchmen and firemen, including dump laborers, employed by the Respondent at its Otis Works, Cleveland, Ohio, but excluding lieutenants, captains and supervisors, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act, as found in Board Case No. R-5143.

6. Respondent admits that on or about May 26, 1943, a majority of the employes in the alleged appropriate unit, by secret ballot selected the Union as their representative, that the election was held pursuant to the Board's Direction, conducted by Board's agents, all in conformity with the established procedure of the Board. The Complaint alleges that "at all times thereafter" the majority status continues: Respondent answers that it has no knowledge concerning the averment.

7. Respondent admits that on or about June 5, 1943, the Board issued its Certification of Representatives pursuant to Section 9 (a) and Section 9 (c) of the Act.

The Complaint alleges that "at all times since the said certification, the Union has been and continues to be the exclusive representative." Respondent answers that it does not know whether or not the designation is continuing.

8. Respondent admits that on or about May 28, 1943, the Union, by its agent, made a request of Respondent to bargain collectively

with the Union as representative of employes in the alleged appropriate unit.

9. Respondent admits that it has refused to recognize and accept as appropriate the unit found by the Board to be appropriate.

Respondent admits that on or about June 23, 1943, a refusal to bargain with representatives of the Union was made.

Respondent denies that "since on or about June 23, 1943, and at all times thereafter" it has refused to bargain with representatives of the Union.

The Board's agent, by letter dated August 14, 1943, directed an inquiry to Respondent; excerpts from said letter are as follows:

"The Union has submitted to me a letter under date of June 23, signed by your company. You state, in substance, that you consider a unit of guards inappropriate and you, therefore, decline to bargain with the certified Union for such class of employes. Will you please let me know if this is the definite position taken by the Company in this matter."

56 Respondent, by letter dated September 4, 1943, replied to the inquiry, the pertinent excerpts being as follow:

"Recently, we have had a National Labor Relations Board hearing in a case involving Plant Guards at the Pittsburgh Works of the Corporation and are awaiting a decision in that case. Therefore, we are deferring an answer with respect to bargaining with representatives of units composed of Plant Guards until such time as a final position of the Corporation has been established."

Respondent submits that its refusal to bargain is qualified and conditional and not final and conclusive as alleged in the Complaint.

10. Respondent denies the allegations contained in Paragraphs 10, 11, 12, and 13 of the Complaint.

JONES & LAUGHLIN STEEL CORPORATION,
By E. F. BLANK,
Director of Personnel Relations.

SEPTEMBER 24, 1943.

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

Before me, the undersigned, a Notary Public in the County and Commonwealth aforesaid, personally appeared Earl F. Blank, who being by me duly sworn, did depose and say that he is the duly authorized agent with power of attorney for Jones & Laughlin Steel Corporation, Respondent in the within Answer,

and authorized to make this affidavit in its behalf; that the statements of fact set forth in the within Answer are true and correct.

E. F. BLANK.

Jones & Laughlin Building,
Third Avenue & Ross Street, Pittsburgh, Pennsylvania.

Sworn to and subscribed to before me this 24th day of September A. D. 1943.

[SEAL] HOWARD L. SNYDER, *Notary Public.*

My commission expires February 24, 1946.

Before the National Labor Relations Board, Eighth Region

Case No. 8-C-4548

IN THE MATTER OF JONES & LAUGHLIN STEEL CORPORATION, *and* UNITED STEELWORKERS OF AMERICA, CIO

Transcript of testimony

ROOM 702, PUBLIC SQUARE BLDG.,
Cleveland, Ohio, Tuesday, September 28, 1943.

Pursuant to notice, the above-entitled matter came on for hearing at 10 a. m.

Before JOHN H. EADIE, Trial Examiner.

Appearances

John Robert Hill, Esq., for the Board.

James C. Beech, Esq., Jones & Laughlin Building, 3rd Avenue & Ross Street, Pittsburgh, Pennsylvania, for Respondent.

William F. Donovan, Director, and Leo E. Casey, Representative, 804 Chester-Ninth Building, Cleveland, Ohio, for United Steelworkers of America, (CIO).

Trial Examiner EADIE.

* * * * * * *

The Trial Examiner will allow an automatic exception to all adverse rulings, and upon appropriate order an objection and exception will be permitted to stand to an entire line of questioning.

Offers in Evidence

I make this announcement at this time in order that the parties may schedule their time accordingly.

Mr. HILL. Mr. Reporter, will you please mark this as Board's Exhibits 1-A to 1-G, inclusive, for identification?

(Thereupon, the documents above referred to were marked "Board's Exhibits 1-A to 1-G," inclusive, for identification.)

Mr. Hill. Mr. Examiner, I have had marked for identification, "Board's Exhibits 1-A to 1-G," for identification, a series of papers, or I should say documents. These documents consist of:

Board's Exhibit 1-A, a copy of the Board's Rules and Regulations, Series 2 as Amended.

Board's Exhibit 1-B, copy of Amended Charge in the instant case, signed by Leo E. Casey, representative of the United Steelworkers of America (CIO).

Board's Exhibit 1-C, Complaint in the instant case, signed by Walter E. Taag, Regional Director of the Board's Eighth Regional office.

Board's Exhibit 1-D, Notice of Hearing, setting the hearing on the 28th day of September 1943, at 702 Public Square Building, Cleveland, Ohio; where we are presently in session, at 10 o'clock A. M., Eastern Standard Time.

Board's Exhibit 1-E, Affidavit as to Service, indicating service on the Company, both at Cleveland and Pittsburgh, and United Steelworkers of America, (CIO) at Cleveland.

Board's Exhibit 1-F, Copy of Respondent's Answer in the instant case, subscribed and sworn to by E. F. Blank,
59 Director of Personnel Relations, Jones & Laughlin Steel Corporation.

Board's Exhibit 1-G, copies of a telegram sent to all parties hereto, scheduling this hearing to commence at 11 o'clock Eastern War Time, or 10 o'clock A. M. Eastern Standard Time, on which Cleveland now operates, rather than 10 o'clock A. M., Eastern War Time as originally scheduled, and signed by Walter E. Taag, Regional Director of the Board's Eighth Regional office.

I offer Board's Exhibits 1-A to 1-G, inclusive, for identification, in evidence.

Trial Examiner Eadie. Is there any objection?

Mr. Beech. No objection, Mr. Examiner.

Mr. Donovan. No.

Trial Examiner Eadie. It will be received in evidence.

(Whereupon, the documents heretofore marked "Board's Exhibits 1-A to 1-G," inclusive, for identification, were received in evidence.)

Mr. Hill. May I add, Mr. Examiner, that Board's Exhibit 1-A to 1-G, inclusive, is offered in duplicate, and I will point out that Board's Exhibit 1-G in the duplicate consists of four telegrams rather than one, inasmuch as the copy of 1-G draft in the original of Board's Exhibit 1-A to 1-G, inclusive, was telephoned from the telegraph office, in fact, the message was phoned in, and, due to requirements of the War Communications Board, unless there

are at least seven addresses on a telegram, you have to make them out as separate telegrams, so Board's Exhibit 1-G really consists of four parts in the duplicate.

Trial Examiner EADIE. I see.

Stipulation as to facts

Mr. HILL. At this time, if it please the Examiner, I wish to put in the record by stipulation certain facts concerning the operations of the Company.

It is stipulated and agreed by and among all the parties, that Jones & Laughlin Steel Corporation, hereinafter referred to as the Respondent, is a corporation, organized and existing by virtue of the laws of the Commonwealth of Pennsylvania, maintaining its principal office in the City of Pittsburgh, Pennsylvania.

60 Respondent is engaged in the manufacture of semifinished and finished steel products, and it is the fourth largest producer of steel in the United States.

Respondent operates steel mills located at Pittsburgh, Aliquippa, and McKeesport, Pennsylvania.

Respondent is licensed to do business in the state of Ohio, and operates steel mills, known as the Otis Works in the City of Cleveland, Ohio. The Otis Works consists of two plants, known as the Riverside plant, employing approximately 3,200 employees, and the Lakeside plant, employing approximately 1,500 employees. Respondent, with its subsidiary companies, employs approximately 40,000 employees.

During the year 1942, Respondent used coal, limestone, iron ore, and other raw materials at its Ohio and Pennsylvania plants in excess of $50,000,000 in money value, of which approximately 50 percent originated at points outside the states of Ohio and Pennsylvania.

During the year 1942 the value of finished products produced by the Respondent at its Ohio and Pennsylvania plants was in excess of $225,000,000, of which approximately 50 percent was shipped to points outside the states of Ohio and Pennsylvania.

More specifically, dealing with the operations of Respondent at its Otis Works, Respondent used coal, limestone, iron ore and other raw materials at its Otis Works during the year 1942 in excess of $1,000,000; approximately 50 percent of which came from points outside the state of Ohio. During the year 1942, Respondent manufactured approximately 1,000,000 tons of ingot steel as its finished products, in excess of 50 percent of which was shipped to points outside the state of Ohio.

Respondent concedes that it is engaged in commerce within the meaning of Section 2 (6) and (7) of the National Labor Relations Act.

Do you so stipulate, Mr. Beech?

Mr. BEECH. Respondent so stipulates.

Mr. HILL. Do you so stipulate, Mr. Donovan?

Mr. DONOVAN. Yes.

61 Trial Examiner EADIE. This proceeding, I take it, is concerned only with the Otis Works?

Mr. HILL. That is correct.

* * * * * *

(Thereupon, the document above referred to was marked "Board's Exhibit 3," for identification.)

Trial Examiner EADIE. Just a moment, please, Mr. Hill, in the decision and direction of election, the Board finds that all patrolmen, watchmen, and firemen, including dump laborers, but excluding lieutenants, captains, and supervisors, constitute the appropriate unit.

Mr. HILL. That is correct, and that is the unit alleged, Mr. Examiner.

Trial Examiner EADIE. The same you allege in the Complaint?

Mr. HILL. Yes; paragraph 5 of the Complaint, to be the appropriate unit, and to be the unit found by the Board in Case No. R-5143 to be appropriate.

Trial Examiner EADIE. Now, as I understand, at the time of this "R" case, the Company contended that that was not an appropriate unit, and the Board rejected the Company's contention at that time.

Mr. HILL. I think that is a correct statement. Is it not, Mr. Beech?

Mr. BEECH. That is true.

Trial Examiner EADIE. All right.

Mr. HILL. I have had marked for identification as Board's Exhibit 3, a copy of the Certification of representatives in the matter of the Jones & Laughlin Steel Corporation, Otis Works, and United Steelworkers of America (CIO), before the National Labor Relations Board, dated June 5, 1943.

That is offered, in duplicate, Mr. Examiner.

Trial Examiner EADIE. You offer that in evidence?

Mr. HILL. Yes; Board's Exhibit No. 3.

Trial Examiner EADIE. Any objection to it?

Mr. BEECH. No objection.

62 Trial Examiner EADIE. It will be received in evidence as Board's Exhibit 3.

NLRB 257
5-16-42

BEFORE NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

NOTICE OF ELECTIO

RIGHTS OF EMPLOYEES

Under Section 7 of the National Labor Relations Act, employees have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

PURPOSE OF ELECTION

An election by secret ballot will be conducted under the supervision of the undersigned Regional Director of the National Labor Relations Board among the eligible voters described herein to determine the representative, if any, desired by them for the purpose of collective bargaining with their employer.

SECRET BALLOT

The election will be by SECRET ballot. Voters will be allowed to vote without interference, restraint, or coercion. Electioneering will not be permitted at or near the polling place. Violations of these rules should be reported immediately to the Regional Director or his agent in charge of the election.

ELECTION

ELIGIBLE VOTERS

EMPLOYEES OF
JONES & LAUGHLIN STEEL CORPORATION, OTIS WORKS
CLEVELAND, OHIO

Those eligible to vote are all patrolmen, watchmen, and firemen employed by the Company at its Otis Works during the pay-roll period immediately preceding May 3, 1943, including dump laborers and any such employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding lieutenants, captains, supervisors and any who have since quit or been discharged for cause.

TIME AND PLACE OF ELECTION

DATE:	Wednesday, May 26, 1943	
TIME:	7:00 a.m. to 8:00 a.m. and 3:00 p.m. to 4:00 p.m.	
PLACE:	VOTING PLACE #1:	LAKESIDE PLANT, ROOM 16
	VOTING PLACE #2:	3341 JENNINGS ROAD TRANSPORTATION OFFICE
	VOTING PLACE #3:	315 CLARK AVENUE IN BLAST FURNACE OFFICE

Your attention is called to Section 12 of the National Labor Relations Act:

ANY PERSON WHO SHALL WILLFULLY RESIST, PREVENT, IMPEDE OR INTERFERE WITH ANY MEMBER OF THE BOARD OR ANY OF ITS AGENTS OR AGENCIES IN THE PERFORMANCE OF DUTIES PURSUANT TO THIS ACT SHALL BE PUNISHED BY A FINE OF NOT MORE THAN $5,000 OR BY IMPRISONMENT FOR NOT MORE THAN ONE YEAR, OR BOTH.

An Agent of the Board will hand a ballot to each eligible voter at the voting place. The voter will then mark the ballot in secret in a voting booth and fold it. The voter will then personally deposit the folded ballot in a ballot box under the supervision of an Agent of the Board.

Incorporated herein for your information only is a copy of the official ballot.

AUTHORIZED OBSERVERS

Each of the interested parties may designate an equal number of observers, this number to be determined by the Regional Director or his agent in charge of the election. These observers will have the following duties and privileges:

(a) To act as checkers at the voting place and at the counting of ballots;
(b) To assist in the identification of voters;
(c) To challenge voters and ballots;
(d) To otherwise assist the Regional Director or his agent.

THIS IS THE ONLY OFFICIAL NOTICE OF THIS ELECTION AND MUST NOT BE DEFACED BY ANYONE

United States of America
National Labor Relations Board

OFFICIAL BALLOT

To determine the representative, if any, for purposes of collective bargaining for certain employees of JONES & LAUGHLIN STEEL CORPORATION, OTIS WORKS, Cleveland, Ohio.

1. Mark an X in one square only.
2. Fold your ballot to conceal the X and personally put it in the ballot box.
3. If you spoil your ballot, return it to the Board's Agent and obtain a new one.

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

Do you desire to be represented by UNITED STEELWORKERS OF AMERICA (CIO)?

YES	NO
☐	☐

SAMPLE

THIS IS A SECRET BALLOT AND MUST NOT BE SIGNED

WALTER E. TAAG
REGIONAL DIRECTOR
EIGHTH REGION

(Whereupon, the document heretofore marked "Board's Exhibit 3," for identification, was received in evidence.)

Mr. Hill. Mr. Reporter will you please have this marked as "Board's Exhibit No. 4," for identification?

(Thereupon, the document above referred to was marked "Board's Exhibit No. 4," for identification.)

Mr. Hill. Mr. Examiner, I have had marked for identification, "Board's Exhibit 4," a carbon copy of a letter dated May 28, 1945, addressed to Mr. Earl F. Blank, director of Personnel Relations, Jones & Laughlin Steel Corporation, Pittsburgh, Pennsylvania, signed by William F. Donovan, District Director.

I will ask the Company, the Respondent, and the Union if it may be stipulated that Board's Exhibit 4 for identification is a true and correct copy of the original letter of which Board's Exhibit 4 for identification, purports to be?

Mr. Donovan. It is.

Mr. Hill. And, further, that Board's Exhibit 4 for identification, was written and sent to the Respondent Corporation by William F. Donovan, District Director of District No. 28 on behalf of the United Steelworkers of America, CIO.

Trial Examiner Eadie. Was it received?

Mr. Hill. And that it was received by Respondent Corporation. May it be so stipulated, Mr. Beech?

Mr. Beech. Mr. Examiner, Respondent will stipulate that the proffered copies of letters are duplicates of the original which was received by the Jones & Laughlin Corporation.

Mr. Hill. And may it be stipulated, further, Mr. Beech, that the original of Board's Exhibit 4 for identification was on the letterhead of the United Steelworkers of America, District 28 (CIO)?

Mr. Beech. That is a correct designation; yes.

Mr. Hill. And may it be so stipulated?

Mr. Beech. It did appear on the original of the letter?

Mr. Hill. May it be so stipulated, Mr. Donovan?

Mr. Donovan. Yes.

Mr. Hill. And may it also be stipulated, Mr. Beech, that the letter was sent on behalf of the United Steelworkers of America (CIO)?

Mr. Beech. Yes, it may.

Mr. Hill. And you so stipulate, Mr. Donovan?

Mr. Donovan. We so stipulate.

Mr. Hill. I offer Board's Exhibit No. 4 for identification in evidence.

(Whereupon, the document heretofore marked "Board's Exhibit No. 4," for identification, was received in evidence.)

* * * * * *

Mr. HILL. May it be further stipulated that Board's Exhibit No. 5 was received by the United Steelworkers of America (CIO)?

Mr. DONOVAN. So stipulate.

* * * * * *

(Whereupon, the document heretofore marked "Board's Exhibit No. 5," for identification, was received in evidence.)

Mr. HILL. I have had marked for identification as "Board's Exhibit No. 6," a copy of a letter on the letterhead of the Jones & Laughlin Steel Corporation, to all patrolmen, watchmen, firemen, and dump laborers at the Otis Works of the Jones & Laughlin Steel Corporation, signed by Jones & Laughlin Steel Corporation, dated May 25, 1943.

May it be stipulated, Mr. Beech, that Board's Exhibit No. 6, for identification, is the statement referred to in the second paragraph of Board's Exhibit No. 5, the second sentence of said paragraph, stating: "Proof of this is to be found in the Statement dated May 25, 1943, handed each plant guard at the Otis Works."

64 Mr. BEECH. It may; whether or not it was handed to them or delivered in a letter, I do not know. However, Respondent stipulates it was transmitted to the plant guards.

Trial Examiner EADIE. Board's Exhibit 6 is the statement, it is stipulated that Board's Exhibit 6 is the statement referred to in Board's Exhibit 5?

Mr. BEECH. It is, Mr. Examiner.

Mr. HILL. And counsel for Respondent also stated that he would stipulate that it was transmited to the employees named in the heading of Board's Exhibit 6 for identification.

Trial Examiner EADIE. Yes; is that so stipulated?

Mr. BEECH. Yes, in some manner; yes.

Trial Examiner EADIE. All right.

Mr. HILL. And may it be stipulated that it was transmitted to those said employees on May 25, 1943, the date appearing on Board's Exhibit 6 for identification?

Trial Examiner EADIE. On or about.

Mr. HILL. On or about.

Mr. BEECH. On or about would be more precise.

Trial Examiner EADIE. Is it so stipulated?

Mr. BEECH. Yes.

Mr. HILL. I offer Board's Exhibit No. 6 for identification, in evidence.

Trial Examiner EADIE. Any objection?

Mr BEECH. No objection.

Trial Examiner EADIE. It will be received in evidence as Board's Exhibit No. 6.

(Whereupon, the document heretofore marked "Board's Exhibit No. 6," for identification, was received in evidence.)

Mr. HILL. If it please the Examiner, the Board rests.

Mr. BEECH. Mr. Examiner, I believe Respondent's Answer sets forth pretty well Respondent's position with reference to the case; however, I should like to elaborate a little bit by——

Trial Examiner EADIE. Before you begin, Mr. Beech, I think we will take a five-minute recess; I would like to study your Answer a little further.

65 MR. BEECH. All right.

(Thereupon, a short recess was taken.)

Trial Examiner EADIE. The hearing will come to order.

Mr. BEECH. Mr. Examiner, in order to clarify Respondent's position, I should like to introduce in evidence copies of an exchange of correspondence between Respondent and the agents of the Eighth Regional Office of the National Labor Relations Board.

(To the reporter.) Mark this as "Respondent's Exhibit No. 1," for identification.

* * * * * *

Respondent offers Exhibit 1 in evidence, in duplicate.

Trial Examiner EADIE. In duplicate?

Mr. BEECH. Yes.

Mr. HILL. There is an objection, Mr. Examiner, on the ground of immateriality and irrelevancy. I can see no relevance in this proceeding of the letter to Respondent Corporation informing them of the filing of the charge. I think it may very well be presumed that the Respondent Corporation was informed that charges were filed.

Trial Examiner EADIE. I will overrule the objection.

It will be received in evidence as Respondent's Exhibit 1.

(Whereupon, the document heretofore marked "Respondent's Exhibit 1," for identification, was received in evidence.)

Mr. BEECH (to the reporter). Mark this as "Respondent's Exhibit 2," for identification.

(Thereupon, the document above referred to was marked "Respondent's Exhibit 2," for identification.)

Mr. HILL. I might state, Mr. Examiner, the purpose of my objection was not only to immateriality and irrelevancy, I realize that it comes a little late, but I also want to inquire whether the Respondent is asking the Board to take notice of any particular part of Respondent's Exhibit 1.

Mr. Beech. Mr. Examiner, the particular reference is made to the last paragraph, being an inquiry of the present position of Respondent with respect to bargaining.

66 Respondent's Exhibit 2, marked for identification, is a letter under date of September 4, 1943, addressed to Mr. Louis Plos, Field Examiner, National Labor Relations Board, Eighth Region, Public Square Building, Cleveland, Ohio. Re: Jones & Laughlin Steel Corporation, Otis Works, Case No. 8-C-1548.

* * * * * *

It is offered in evidence in duplicate.

Mr. Hill. Before waiving any objection, Mr. Examiner, I wish to inquire of Respondent's counsel whether Respondent's Exhibit 2, for identification, purports to be a letter in response to Respondent's Exhibit 1? I am compelled to make that inquiry by virtue of the first paragraph in Respondent's Exhibit No. 2, marked for identification, which states that (Reading): "Referring to our telephone conversation of yesterday, representatives of Jones & Laughlin Steel Corporation will be pleased to confer with you in your office concerning the charges filed in the above-named case."

Mr. Beech. Respondent's Exhibit No. 2 is in answer to the letter of the National Labor Relations Board's agent, in addition to reference to the telephone conversation referred to in said letter.

Mr. Hill. But counsel certainly does not maintain that Respondent's Exhibit No. 2 purports to be, on its face, an answer to Respondent's Exhibit No. 1, does it?

Mr. Beech. Reference is made to the telephone conversation, however, the letter carries an answer to Mr. Plost's inquiry of August 14th, which I believe is the date.

Trial Examiner Eadie. Just a moment.

(The Examiner referred to documents.)

Trial Examiner Eadie. Has your question been answered?

Mr. Hill. Yes; and I think the record will show that Respondent's Exhibit 2 for identification refers only to a telephone conversation, and makes no reference to any letter of August 14, 1943, or of any other date.

Trial Examiner Eadie. The exhibit in itself.

Mr. Hill. That is correct; and, also, before waiving any

67 possible objections I may have to the offering in evidence of Respondent's Exhibit 2 for identification, I would like to ask counsel for clarification or an interpretation of the third paragraph of Respondent's Exhibit 2 for identification, to wit: [Reading] "Therefore, we are deferring an answer with respect to bargaining with representatives of units composed of Plant

Guards until such time as a final position of the Corporation has been established."

Therefore, I ask counsel for the Respondent if it is the position of the Respondent that it will now bargain with the United Steelworkers of America, CIO, as exclusive representative of the employees of the unit found appropriate in Case No: R-5143; or does Respondent desire to think it over? Is that the meaning carried in Respondent's Exhibit 2 for identification?

Mr. Beech. Possibly I can clarify that as I go along with the case.

Mr. Hill. The reason I ask that now, Mr. Beech, was to avoid the waiver of any objections I might have to Respondent's Exhibit 2 for identification.

Mr. Beech. Well, Respondent's Exhibit 2 offered is merely put in for a statement of the present position as of September 4, 1943, the date of the letter.

Mr. Hill. Is the present position of Respondent Corporation one of agreeing to bargain with the Union of this date or wanting to think it over until some further and unspecified date?

Mr. Beech. Yes. I might state that Respondent hasn't taken a definite position as of this date.

Trial Examiner Eadie. In other words, it is the Respondent's position as of this date that it is still not ready to say that it is willing to bargain with the Union?

Mr. Beech. It is not prepared to say it will or will not, at this time, Mr. Examiner.

Mr. Hill. In other words, Respondent Corporation desires and will take time to think this matter over.

Mr. Beech. That is true.

68 Trial Examiner Eadie. At any rate, as of today the Respondent is not prepared to say that it will bargain with the Union.

Mr. Beech. That's true.

Mr. Hill. With that answer of counsel for the Respondent I have no objection to the offer in evidence.

Trial Examiner Eadie. It will be received as Respondent's Exhibit No. 2.

(Whereupon, the document heretofore marked "Respondent's Exhibit 2," for identification, was received in evidence.)

* * * * *

Mr. Beech. Respondent's Exhibits 3-A, 3-B, and 3-C, marked for identification, are copies of letters addressed to the Chairman and Board Members of the National Labor Relations Board, the letter being as follows:

Mr. Hill. There is an objection, Mr. Examiner, if the contents of this letter are in reference to any other case, even though it involves the Respondent Corporation, other than the instant case.

Trial Examiner Eadie. What is your position on it, Mr. Beech?

Mr. Beech. It is being introduced to clarify Respondent's present position in respect to bargaining with units composed of Plant Guards and are copies of letters addressed to the National Labor Relations Board that I should like to introduce in evidence.

Mr. Hill. I submit, Mr. Examiner, that the Respondent's position in regard to any other unit, or any other similar unit in any other plant of the Respondent Corporation, has no materiality or relevancy or bearing whatsoever on the issues of this case. Either the Respondent Corporation has bargained or has refused to bargain.

Trial Examiner Eadie. Without commenting on that, I will overrule the objection and permit Mr. Beech to read it into the record.

* * * * * * *

69 Respondent's Exhibits 3-A, 3-B, and 3-C, are copies of letters addressed to individual Board members.

Mr. Hill. Are they identical to the copy which you just read, Mr. Beech?

Mr. Beech. Yes. 3-B and 3-C being different addresses.

Trial Examiner Eadie. Is that offered in evidence?

Mr. Beech. I offer them in evidence, Mr. Examiner.

Mr. Hill. The same objection that I previously made, Mr. Examiner, to the offer of the Respondent's Exhibits 3-A to 3-C, inclusive. I object to the offer in evidence of the Respondent's Exhibits 3-A, 3-B, and 3-C, for identification on the grounds that the Respondent's position in any other litigation other than the instant case can have no possible materiality or relevancy in this proceeding.

Mr. Beech. It certainly is relevant with respect to Respondent's position, Mr. Examiner. We should like to introduce it for that purpose.

Trial Examiner Eadie. It is relevant to Respondent's position. However, I do more or less agree with Mr. Hill that it is not material; at least in my opinion it doesn't seem material in this case.

However, I will overrule the objection and receive them in evidence as Respondent's Exhibits 3-A, 3-B, and 3-C.

* * * * * * *

Mr. BEECH. Respondent's Exhibit No. 4, marked for identification, is a copy of a letter received by Respondent from John E. Lawyer, Chief, Order Section, National Labor Relations Board, Washington, D. C. [Reading:]

* * * * * * *

I offer that in evidence.

Trial Examiner EADIE. Is there any objection?

Mr. HILL. Yes; there is an objection on the ground that what position the Board takes on any disposition of Respondent's request for oral argument in some other cases has no more relevancy here than whether Chicago is the second largest city in the United States or is the third largest city.

70 Trial Examiner EADIE. I will make the same ruling. I will overrule the objection and receive it in evidence.

* * * * * * *

Mr. BEECH. Respondent rests.

Mr. HILL. The Board has no rebuttal evidence, Mr. Examiner.

Trial Examiner EADIE. Has the Union anything in addition?

Mr. DONOVAN. No.

Trial Examiner EADIE. Does anybody wish to make any oral argument? Mr. Beech?

Mr. BEECH. No.

Trial Examiner EADIE. Mr. Donovan?

Mr. DONOVAN. No.

Trial Examiner EADIE. Mr. Hill?

Mr. HILL. No, Mr. Examiner.

Trial Examiner EADIE. Do any of the parties wish to submit briefs?

Mr. BEECH. We will reserve that right.

Trial Examiner EADIE. If you do wish to submit a brief you must have it in in five days from today, if the hearing closes today.

Mr. CASEY. Is it possible for us to submit a brief?

Trial Examiner EADIE. You must have it in in five days.

Mr. CASEY. We have no intention at the present time of submitting one.

Mr. DONOVAN. No, we have not. We have submitted enough now, to hang them, see?

Trial Examiner EADIE. If there is no further evidence, the hearing is closed.

* * * * * * *

71 *Board's Exhibit No. 2*

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. R 5143

IN THE MATTER OF JONES AND LAUGHLIN STEEL CORP., OTIS WORKS, *and* UNITED STEELWORKERS OF AMERICA (CIO)

Mr. Earl F. Blank, of Pittsburgh, Pa., and Mr. F. W. Mumper, of Cleveland, Ohio, for the Company.
Mr. William F. Donovan, of Cleveland, Ohio, for the Union.
Mr. David V. Easton, of counsel to the Board.

DECISION AND DIRECTION OF ELECTION

STATEMENT OF THE CASE

Upon petition duly filed by United Steelworkers of America (CIO), herein called the Union, alleging that a question affecting commerce had arisen concerning the representation of employees of Jones & Laughlin Steel Corporation, Otis Works, Cleveland, Ohio, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Louis Plost, Trial Examiner. Said hearing was held at Cleveland, Ohio, on April 8, 1943. The Company and the Union appeared, participated, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The Company made a motion to dismiss the petition on the ground that a unit of guards is not appropriate. The Trial Examiner referred this motion to the Board. For reasons appearing below this motion is denied. The Trial
72 Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Company submitted a statement by an official of the Bethlehem Steel Corporation to the House Military Affairs Committee which has been considered by the Board in lieu of a brief.

Upon the entire record in the case, the Board makes the following:

FINDINGS OF FACT

1. THE BUSINESS OF THE COMPANY

Jones & Laughlin Steel Corporation, a Pennsylvania corporation licensed to do business in Ohio, operates plants in Cleveland, Ohio, known as the Otis Works, with which we are concerned herein. The Company is engaged in the manufacture of steel and

steel products in various forms. During the year 1942 the raw materials used by the Company and the finished products manufactured by the Company amounted in each instance to more than $1,000,000. In excess of 50 percent of the raw materials and finished products came to the Company and were shipped and sold by the Company from and to points outside the State of Ohio. The Company is engaged in production for the national war effort and admits that it is engaged in commerce within the meaning of the National Labor Relations Act.

II. THE ORGANIZATION INVOLVED

United Steelworkers of America is a labor organization affiliated with the Congress of Industrial Organizations admitting to membership employees of the Company.

III. THE QUESTION CONCERNING REPRESENTATION

On February 17, 1943, the Union requested recognition as a bargaining representative of its plant-protection employees. The Company refused to recognize the Union unless it was certified by the Board.

A statement of the Field Examiner, introduced into evidence at the hearing, indicates that the Union represents
73 a substantial number of employees in the unit hereinafter found appropriate.[1]

We find that a question affecting commerce has arisen concerning the representation of employees of the Company within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

IV. THE APPROPRIATE UNIT

The Union contends that all patrolmen, watchmen, and firemen, including dump laborers[2] but excluding lieutenants, captains and supervisors employed at the Otis Works constitute a unit appropriate for the purposes of collective bargaining. The Company maintains that such employees are not an appropriate unit, claiming that these employees should not be permitted to choose a collective bargaining agent since they are either sworn members of the auxiliary military police or under its control. However, the record discloses that although the employees in the proposed unit take the Army oath, they are under the control of the Company as to pay, conditions of employment, and benefits. We have frequently

[1] The Field Examiner reported that the Union submitted 37 designation cards bearing apparently genuine original signatures, of which 34 contained names appearing upon the Company's pay roll of March 2, 1943. This pay roll contained 62 names within the appropriate unit.

[2] The dump laborers as well as the other classifications sought by the Union perform plant protection work.

found that plant guards hired and paid by private employers, are employees within the meaning of the Act, and may designate a representative for the purposes of collective bargaining, even though they are members of the auxiliary military police.[3] Accordingly, the Company's contention is rejected.

The Union already represents all production and maintenance employees of the Company under a contract dated December 2, 1942, and the employees in the unit proposed herein are specifically excluded from the benefits of the above-mentioned contract. However, the Union does not intend to merge the plant-protection employees with the unit for which it has already been recognized as the exclusive bargaining agent, but intends to bargain for them as a separate unit. We have, on several occasions heretofore, permitted the same labor organization to bargain for the production and maintenance employees and the plant-protection employees in separate units.[4]

Accordingly we find that all patrolmen, watchmen, and firemen, including dump laborers employed by the Company at its Otis Works, but excluding lieutenants, captains, and supervisors, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.[5]

V. THE DETERMINATION OF REPRESENTATIVES

We shall direct that the question concerning representation which has arisen be resolved by an election by secret ballot among the employees in the appropriate unit who were employed during the payroll period immediately preceding the date of our Direction of Election, subject to the limitations and additions set forth therein.

DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended, it is hereby

[3] Matter of Westinghouse Air Brake Company and United Electrical, Radio & Machine Workers of America, Local No. 610, 42 N. L. R. B. 525; Matter of Chrysler Corporation, Highland Park Plant and Local 114, United Automobile, Aircraft, and Agricultural Implement Workers of America, affiliated with the C. I. O., 44 N. L. R. B. 881; Curtiss-Wright Corporation and American Federation of Labor, 45 N. L. R. B. No. 86; William J. Burns Detective Agency and American Federation of Labor, 47 N. L. R. B., No. 81.

[4] Matter of Phelps Dodge Copper Products Corp. and United Electrical, Radio & Machine Workers of America, Local No. 441, affiliated with the Congress of Industrial Organizations, 41 N. L. R. B. 973; Chrysler Corporation, Highland Park Plant and Local 114, United Automobile, Aircraft, and Agricultural Implement Workers of America, affiliated with the C. I. O., 44 N. L. R. B. 881.

[5] Matter of Chrysler Corporation, Highland Park Plant and Local 114, United Automobile, Aircraft, and Agricultural Implement Workers of America, affiliated with the C. I. O., supra.

Directed that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with Jones
75 & Laughlin Steel Corporation, Otis Works, Cleveland, Ohio, an election by secret ballot shall be conducted as early as possible, but not later than thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Eighth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Section 10, of said Rules and Regulations, among the employees in the unit found appropriate in Section IV, above, who were employed during the pay-roll period immediately preceding the date of this Direction, including any such employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding any who have since quit or been discharged for cause, to determine whether or not they desire to be represented by United Steelworkers of America, affiliated with the Congress of Industrial Organizations, for the purposes of collective bargaining.

Signed at Washington, D. C., this 3rd day of May 1943.

[SEAL]

HARRY A. MILLIS,
Chairman,
GERARD D. REILLY,
Member,
JOHN M. HOUSTON,
Member,
National Labor Relations Board.

76 *Board's Exhibit No. 4*

Copy to Leo Casey.

MAY 28, 1943.

Mr. EARL F. BLANK,
Director of Personnel Relations,
Jones & Laughlin Steel Corporation, Pittsburgh, Pa.

DEAR MR. BLANK: Now that we have won a National Labor Relations Board election of guards at your Otis Division, and have been certified as bargaining agency for that group, it is my desire that we begin negotiations for a contract at the earliest possible time.

I shall appreciate hearing from you, giving us a date when a meeting can be arranged to start such negotiations.

Hoping that the meeting may be held at an early date, and with best wishes, I am

Very truly yours,

(S) WILLIAM F. DONOVAN,
District Director.

WFD/b.

Copy to Mr. Frank Kovarik, President, Local Union 2915, Cleveland, Ohio.

77 *Board's Exhibit No. 5*

JONES & LAUGHLIN STEEL CORPORATION

(Letterhead)

JUNE 23, 1943.

MR. WILLIAM F. DONOVAN,
District Director, United Steelworkers of America,
District No. 28,
803-804 Chester-Ninth Building, Cleveland, Ohio.

DEAR MR. DONOVAN: We have your letter of May 28, 1943, requesting that we meet with you, as soon as possible, to commence collective bargaining on behalf of the plant guards at the Otis Works.

As you are well aware, the Corporation objected and still objects to the appropriateness of plant guards as a bargaining unit. Proof of this is to be found in the Statement, dated May 25, 1943, handed each plant guard at the Otis Works. As set forth in that Statement, it is our intention to use every legal means available to us to have plant guards classified with Supervisors in respect to collective bargaining. In accordance with this policy we are obliged to decline your request that we bargain with you on behalf of plant guards.

Very truly yours,

JONES & LAUGHLIN STEEL CORPORATION,
By E. F. BLANK,
Director of Personnel Relations.

WHH:AKK.

78 *Board's Exhibit No. 6*

JONES & LAUGHLIN STEEL CORPORATION

To All Patrolmen, Watchmen, Firemen, and Dump Laborers at the Otis Works of Jones & Laughlin Steel Corporation:

The National Labor Relations Board has directed that an election be conducted to determine whether you men, having the duties of plant guard, desire the United Steelworkers of America to be your exclusive collective bargaining agent.

Jones & Laughlin Steel Corporation has consistently maintained that supervisors and plant guards should not be included in bargaining units because both groups represent management in safeguarding the Corporation's property and maintaining order and discipline among its employees.

Because our plant guards, like our supervisors, have been regarded as members of the management's staff, they have been expressly excluded from all our union agreements. Plant guards, as an arm of management, have always been maintained as an effective, responsible, and efficient organization. The responsibilities of plant guard to management are essentially the same as peace officers' duties to the Governor of a State or the Mayor of a City. Management could no more operate efficiently without plant guards responsible solely to it than public officials could operate without their sworn peace officers.

Since ordering the election, in this case, the National Labor Relations Board has ruled that supervisory employes cannot be a bargaining group. It is our intention to use every legal means available to us to secure a similar decision with respect to our plant guards.

In your present capacity as a plant guard, your duties and responsibilities are substantially different from those production and maintenance employes who are covered by the 1942 Agreement between the Jones & Laughlin Steel Corporation and the United Steelworkers of America.

79 Any plant guard who does not wish to continue as a part of management, who believes his interests require representation, and feels that he is more a part of the production and maintenance group than the management staff, will, upon request, be transferred to an equivalent production or maintenance occupation.

JONES & LAUGHLIN STEEL CORPORATION.

CLEVELAND, OHIO, *May 25, 1943.*

Respondent's Exhibit No. 1

[Copy]

NATIONAL LABOR RELATIONS BOARD

8TH REGION

PUBLIC SQUARE BUILDING,
Cleveland, Ohio, August 14, 1943.

JONES & LAUGHLIN STEEL CORPORATION,
Otis Works, Pittsburgh, Pa.
Attn: Mr. E. F. Blank, Director of Personnel Relations

Re: Jones & Laughlin Steel Corporation, Otis Works Case No. 8-C-1548

GENTLEMEN: This will advise you that on August 13, 1943, a charge was filed in the above-entitled case.

The charge alleges, in substance, that the Company has committed violations of Section 8, subsections (1) and (5) of the National Labor Relations Act, by interfering with, restraining, and coercing its employees in their exercise of the rights guaran-
80 teed in Section 7 of the Act, and by refusing to bargain with the United Steelworkers of America (CIO) as representatives of all patrolmen, watchmen, and firemen despite the fact that the above-mentioned Union was certified by the National Labor Relations Board on June 5, 1943 as the sole representative of such employees.

This case has been assigned to me for investigation.

The Union has submitted to me a letter under date of June 23, signed by your Company. You state, in substance, that you consider a unit of guards inappropriate and you, therefore, decline to bargain with the certified Union for such class of employees.

Will you please let me know if this is the definite position taken by the Company in this matter. I trust you will give this matter your very prompt attention.

Respectfully yours,

(S) LOUIS PLOST,
Field Examiner.

Respondent's Exhibit No. 2

JONES & LAUGHLIN STEEL CORPORATION

(Letterhead)

SEPTEMBER 4, 1943.

MR. LOUIS PLOST,
Field Examiner, National Labor Relations Board,
Eighth Region, Public Square Building,
Cleveland, Ohio.

Re: Jones & Laughlin Steel Corporation Otis Works
Case No. VIII C-1548

DEAR SIR: Referring to our telephone conversation of yesterday, representatives of Jones & Laughlin Steel Corporation
81 will be pleased to confer with you in your office concerning the charges filed, in the above named case.

Recently, we have had a National Labor Relations Board hearing in a case involving Plant Guards at the Pittsburgh Works of the Corporation and are awaiting a decision in that case.

Therefore, we are deferring an answer with respect to bargaining with representatives of units composed of Plant Guards until such time as a final position of the Corporation has been established.

Yours very truly,

JONES & LAUGHLIN STEEL CORPORATION,
Director of Personnel Relations.

JCB:ade.

Respondent's Exhibit No. 3-A

JONES & LAUGHLIN STEEL CORPORATION
(Letterhead)

SEPTEMBER, 7, 1943.

HON. H. A. MILLIS,
Chairman National Labor Relations Board,
Shoreham Building, Washington, D. C.

SIR: On August 31, 1943, the National Labor Relations Board upon petition of the United Steelworkers of America held a hearing in Pittsburgh, Pennsylvania, involving Plant Guards of the Pittsburgh Works of Jones & Laughlin Steel Corporation.

82 The Corporation moved to dismiss the Petition because the Petitioner is the same labor organization that represents production and maintenance employes in all of its steel plants, including the Pittsburgh Works, and in the 1942 Agreement between the Corporation and the Union, now in force, watchmen or guards are specifically excluded, together with foremen, salaried employes and nurses.

Plant Guards of the Pittsburgh Works of Jones & Laughlin Steel Corporation are engaged in protecting a $200,000,000 steel plant engaged in 100% war production. The operation of this plant is just as vital as the production of navy planes at the Johnsville Plant of Brewster Aeronautical Corporation, where a recent work stoppage occurred, occasioned by plant guards holding their union rights paramount to allegiance to the U. S. Coast Guard Reserve, and subsequent support by their fellow union production workers in the same union. It is conceivable that a similar situation might arise in the Pittsburgh Works of the Corporation.

The Corporation has given serious consideration to testing the appropriateness of a unit composed of Plant Guards in the U. S. Circuit Court of Appeals. However, corporate officials feel that they would like to have the benefit of oral argument before the Board and some discussion with Board members themselves prior to making a definite decision with regard to bargaining with certified representatives of Plant Guards.

Therefore, will you please consider this as a request for oral hearing before the Board and a further request that you as an individual Board member, grant representatives of the Corporation opportunity for discussion with you.

Respectfully yours,

JONES & LAUGHLIN STEEL CORPORATION,
Director of Personnel Relations.

JCB:ade.

83 *Respondent's Exhibit No. 4*

[Copy]

NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D. C.

H. A. Millis, Chairman, Gerard D. Reilly, John M. Houston.

SEPTEMBER 11, 1943.

MR. EARL F. BLANK,
Director of Personnel Relations,
Jones & Laughlin Steel Corp., Pittsburgh, Pennsylvania.

Re: Jones & Laughlin Steel Corp., Case No. 6-R-770

DEAR MR. BLANK: This will acknowledge receipt of your letter of September 7, addressed to Dr. Millis.

Your request for permission to present oral argument has been referred to the Board for consideration. You will be advised of the action taken at a later date.

Very truly yours,

(S) JOHN E. LAWYER,
Chief, Order Section.

84 Before National Labor Relations Board

Intermediate report

Dated October 5, 1943

Mr. John Robert Hill, for the Board.
Mr. James C. Beech, of Pittsburgh, Pa., for the respondent.
Mr. William F. Donovan and Mr. Leo F. Casey, of Cleveland, Ohio, for the Union.

STATEMENT OF THE CASE

Upon a first amended charge duly filed on September 11, 1943; by United Steelworkers of America (CIO), herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Eighth Region (Cleveland, Ohio), issued its complaint, dated September 16, 1943, against Jones & Laughlin Steel Corporation, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act.

Copies of the complaint accompanied by notice of hearing were duly served upon the respondent and the Union.

With respect to the unfair labor practices the complaint alleged in substance: (1) that on May 3, 1943, the Board in its Decision and Direction of Election in Case No. R-5143[1] found that all patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, Cleveland, Ohio, but excluding lieutenants, captains, and supervisors, constituted a unit appropriate for collective bargaining; (2) that a majority of the employees in the aforesaid appropriate unit designated and selected the Union as their representative for the purposes of collective bargaining at an election conducted by the Board on May 26, 1943; (3) that on June 5, 1943, the Board certified the Union as the exclusive representative of all employees in said unit for the purposes of collective bargaining; (4)
85 that the Union at all times since said certification has been, and continues to be, the exclusive representative of all employees in said appropriate unit; (5) that on or about May 28, 1943, and at all times thereafter, the Union requested the respondent to bargain collectively; (6) that the respondent since on or about June 23, 1943, and at all times thereafter has failed and refused to bargain with the Union; and (7) that by such refusal, the respondent interfered with, restrained, and coerced its employees in the rights guaranteed in Section 7 of the Act.

On or about September 24, 1943, the respondent filed an answer, admitting certain allegations of the complaint as to its business, and as to certain proceedings of the Board leading to the certification of the Union. In its answer, however, the respondent denied the commission of the alleged unfair labor practices, denied the appropriateness of the unit as found by the Board in Case No. R-5143, and denied that it has failed and refused to bargain with the Union, stating that its refusal to bargain was "qualified and conditional."

Pursuant to notice, a hearing was held on September 28, 1943, at Cleveland, Ohio, before the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel, and the Union by its representatives. All parties participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. Although afforded an opportunity to do so, none of the parties argued orally before the undersigned or filed briefs with him.

[1] Matter of Jones & Laughlin Corporation and United Steelworkers of America (CIO).

Upon the entire record in the case, the undersigned makes the following:

Findings of fact

I. THE BUSINESS OF THE RESPONDENT

Jones & Laughlin Steel Corporation is a Pennsylvania corporation engaged in the manufacture of iron and steel products. It operates steel mills in Pittsburgh, Aliquippa, and McKeesport, Pennsylvania, and Cleveland, Ohio. The instant case is
86 concerned only with the steel mills located at Cleveland, Ohio, known as the Otis Works. The Otis Works consist of two plants, known as the Riverside plant, employing approximately 3,200 employees, and the Lakeside plant, employing approximately 1,5000 employees.

With respect to the operations of the Otis Works, the respondent, during the year 1942, used coal, limestone, iron ore, and other raw materials with a value in excess of $1,000,000, approximately 50 percent of which came from points outside the State of Ohio. During the year 1942, the respondent manufactured at the Otis Works approximately 1,000,000 tons of ingot steel, in excess of 50 percent of which was shipped to points outside the State of Ohio.

At the hearing, the respondent admitted that it is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

II. THE ORGANIZATION INVOLVED

United Steelworkers of America (CIO) is a labor organization which admits to membership employees of the respondent.

III. THE UNFAIR LABOR PRACTICES

The refusal to bargain

1. The appropriate unit and representation by the Union of a majority therein

On May 3, 1943, the Board issued a Decision and Direction of Election (Case No. R-5143) finding, among other things, that all patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, but excluding lieutenants, captains, and supervisors, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

On May 26, 1943, an election was held pursuant to said Direction of Election. On June 5, 1943, the Board certified the Union as the representative of the employees in the unit heretofore mentioned for the purposes of collective bargaining.

At the hearing the respondent did not question the fact
87 that the Board had certified the Union as the representative of its employees, but contested the appropriateness of the unit and the subsequent certification of the Union. The respondent did not adduce any evidence on the question of the appropriateness of the unit, or to rebut the presumption arising from the Board's certification that the Union is still the representative of the majority of the employees of the respondent in the appropriate unit.[2]

The undersigned finds, in accordance with the Board's previous determination, that all patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, but excluding lieutenants, captains and supervisors, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act. The undersigned further finds that on and at all times after June 5, 1943, the Union was the duly designated bargaining representative of a majority of the employees in the aforesaid appropriate unit, and that, pursuant to the provision of Section 9 (a) of the Act, the Union was on June 5, 1943, and at all times thereafter has been and is now the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

2. The refusal to bargain

In a letter dated May 28, 1943, the Union requested respondent to bargain collectively with it as the exclusive representative of the employees in the unit. On June 23, 1943, the respondent sent the Union the following letter:[3]

"We have your letter of May 28, 1943, requesting that we meet with you, as soon as possible, to commence collective bargaining on behalf of the plant guards at the Otis Works.

"As you are well aware, the Corporation objected and
88 still objects to the appropriateness of plant guards as a bargaining unit. Proof of this is to be found in the Statement, dated May 25, 1943, handed each plant guard at the Otis Works. As set forth in that Statement, it is our intention to use every legal means available to us to have plant guards classified with Supervisors in respect to collective bargaining. In accordance with this policy we are obliged to decline your request that we bargain with you on behalf of plant guards."

[2] None of the parties produced witnesses at the hearing and the evidence consists wholly of exhibits, stipulations and admissions of counsel.
[3] As noted above, the Board's certification is dated June 5, 1943.

An agent for the Board, by letter dated August 14, 1943, referred to the respondent's refusal to bargain with the Union as set forth in respondent's letter of June 23, 1943, and inquired if this was the "definite position taken by the Company." On September 4, 1943, the respondent sent the Board agent the following letter:

"Referring to our telephone conversation of yesterday, representatives of Jones & Laughlin Steel Corporation will be pleased to confer with you in your office concerning the charges filed, in the above named case.

"Recently, we have had a National Labor Relations Board hearing in a case involving Plant Guards at the Pittsburgh Works of the Corporation and are awaiting a decision in that case.

"Therefore, we are deferring an answer with respect to bargaining with representatives of units composed of Plant Guards until such time as a final position of the Corporation has been established."

During the hearing, the respondent's counsel made the following statements concerning the respondent's position on its willingness to bargain with the Union:

Mr. HILL. Is the present position of Respondent Corporation one of agreeing to bargain with the Union of this date or wanting to think it over until some further and unspecified date?

Mr. BEECH. Yes. I might state that Respondent hasn't taken a definite position as of this date.

89 Trial Examiner EADIE. In other words, it is the Respondent's position as of this date that it is still not ready to say that it is willing to bargain with the Union?

Mr. BEECH. It is not prepared to say it will or will not, at this time, Mr. Examiner.

Mr. HILL. In other words, Respondent Corporation desires and will take time to think this matter over.

Mr. BEECH. That is true.

Trial Examiner EADIE. At any rate, as of today the Respondent is not prepared to say that it will bargain with the Union.

Mr. BEECH. That's true.

The undersigned finds that the respondent on June 23, 1943, and at all times thereafter, has refused to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit, and has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.[1]

[1] The respondent contends that its refusal to bargain is "qualified and conditional and not final and conclusive." This contention is based on respondent's claim of the inappropriateness of the unit as found by the Board and, further, on the fact that the respondent was awaiting a decision in a case before the Board involving "Plant Guards at the Pittsburgh Works." (Referred to in respondent's letter dated September 4, 1943, to the Board's agent, as noted above.) The undersigned does not find any merit in the respondent's contention in this connection.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce, among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Since it has been found that the respondent has engaged in unfair labor practices, it will be recommended that it
90 cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Since it has been found that the respondent has refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, it will be recommended that the respondent, upon request, bargain collectively with the Union.

Upon the basis of the above findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of law

1. United Steelworkers of America (CIO) is a labor organization, within the meaning of Section 2 (5) of the Act.

2. All patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, Cleveland, Ohio, but excluding lieutenants, captains and supervisors, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

3. United Steelworkers of America (CIO) was on June 5, 1943, and at all times thereafter, has been the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing on June 23, 1943, and at all times thereafter, to bargain collectively with the United Steelworkers of America (CIO), as the exclusive representative of all its employees in the aforesaid appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor
91 practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the respondent, Jones & Laughlin Steel Corporation, and its officers, agents, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Steelworkers of America (CIO) as the exclusive representative of all its employees employed as patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis works, but excluding lieutenants, captains and supervisors;

(b) Engaging in any like or related act or conduct interfering with, restraining, or coercing its employees in the exercise of the rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Steelworkers of America (CIO) as the exclusive representative of all of its employees in the aforesaid appropriate unit;

(b) Post immediately in conspicuous places at its Otis Works plants in Cleveland, Ohio, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraph 1 (a) and (b) of these recommendations, and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of these recommendations;

92 (c) Notify the Regional Director for the Eighth Region in writing, within ten (10) days from the date of the receipt of this Intermediate Report, what steps the respondent has taken to comply herewith.

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report, the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 2—as amended, effective October 28, 1943—any party may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceedings (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. As further provided in said Section 33 should any party desire permission to argue orally before the Board, request therefore must be made in writing to the Board within ten (10) days from the date of the order transferring the case to the Board.

Dated October 5, 1943.

JOHN H. EADIE, *Trial Examiner.*

93 Before National Labor Relations Board

Exceptions and objections to intermediate report filed on behalf of Jones & Laughlin Steel Corporation

Dated November 4, 1943

Jones & Laughlin Steel Corporation (hereinafter referred to as the respondent) by its representative, W. H. Harvey, files this, its bill of exceptions and objections to the Intermediate Report of John H. Eadie (sometimes hereinafter referred to as the Examiner), said Intermediate Report having been served upon respondent on October 11, 1943. Respondent excepts and objects to the findings of fact, conclusions of law, the remedy and recommendations as follows:

1. Respondent excepts to that portion of the Intermediate Report that would require respondent to cease and desist from:

"1. (a) Refusing to bargain collectively with United Steelworkers of America (CIO) as the exclusive representative of all its employees employed as patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, but excluding lieutenants, captains, and supervisors."

take the following affirmative action

"2. (a) Upon request, bargain collectively with United Steelworkers of America (CIO) as the exclusive representative of all of its employees in the aforesaid appropriate unit. * * *"

and that conclusion of law holding that

"2. All patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, Cleveland, Ohio, but excluding lieutenants, captains, and supervisors, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act."

National Labor Relations Act—Definitions Section 2. When used in this Act, (2) *The term "employer" includes any person acting in the interest of an employer, directly or indirectly*[1] but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

94

Inasmuch as a corporation can act only through individuals, all of whom are employes of the corporation, such employes acting in that capacity are deemed to be within Section 2 (2) of the Act. The plant guards at the Otis Works of the Corporation represent management by enforcing the rules and regulations of the Corporation, protecting corporate property, and making confidential investigations for the Corporation and various governmental agencies. Hence, any construction of the Act that would make a finding that plant guards are employees within the meaning of Section 2 (3) of the Act, would in effect deprive management of a class of those employees who can and do properly act in the interest of the employer.

Plant guards do not constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act for the reasons that they are not employees within the meaning of Section 2 (3) of the Act and such a finding does not effectuate the policies of the Act. Rather, the conclusion of law hampers the purposes of the Act and has a tendency to defeat true and bona fide collective bargaining. Plant guards, who are civilian auxiliaries to the military police, are confronted with mixed questions of duty, allegiance and responsibility to the U. S. Government, employer and labor organization. In the matter of The Maryland Drydock Company and Local No. 31 of the Industrial Union of Marine and Shipbuilding Workers of America, Cases No. R–5212 and 5214, the Board held that supervisory employers do not constitute a unit appropriate for the purposes of collective bargaining saying * * * "The provisions of Section 9 (b) which render it incumbent upon the Board to consider

[1] Italics supplied.

whether the unit alleged to be appropriate in each case
95 will insure to employees the full benefit of their right to self-organization and to collective bargaining and *otherwise effectuate the policies of the Act* [italics supplied]. In making this determination it is relevant for us to inquire into the status in the managerial hierarchy of the personnel claiming to be an appropriate unit." It is submitted that plant protection employees like supervisory employees exercise a degree of control and supervision over production workers in that they have supervision with respect to policing such personnel and enforcing the Corporation rules and regulations as well as the General Orders imposed by the U. S. Army on War Production Plants and personnel. Although the authority inherent in the plant guards does not extend to the power of hiring and discharging production and maintenance employees, the dominant factor of control over such personnel, i. e., enforcing Corporation's rules and regulations with respect to conduct of employees and protection of plant property is supervision akin to that exerted by foremen and lesser supervisory employees, in that, within the limits of their authority, their recommendations with respect to hiring and firing are given the same serious consideration as the recommendations of supervisors. Plant guards like supervisors of the Corporation have always been regarded as members of Management's Staff and have been expressly excluded from labor agreements negotiated between the Corporation and various labor organizations. The responsibilities of plant guard to Management are essentially the same as peace officers' duties to the governor of a state or the mayor of a city. Management can no more operate efficiently without plant guards responsible solely to it than public officials can function without their sworn peace officers. The conclusion of law holding that plant guards constitute an appropriate unit within the meaning of Section 9 (b) exceeds the administrative discretion of the Board.

2. Respondent excepts to that portion of the Intermediate Report that would require respondent to cease and desist from

96 "1. (b) Engaging in any like or related act or conduct interferring with, restraining, or coercing its employees in the exercise of the rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act."

and that conclusion of law holding that respondent

"5. By interferring with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act."

The conclusion of law and proposed Board Order recommended by the Examiner are not supported by any evidence in the record or any finding of fact upon which to base such a conclusion and recommendation. Respondent challenges Board or Union to submit any instance wherein any representative of the Corporation has singly or collectively interferred with plant guards or been guilty of the type coercion practiced by Union to secure members.

3. Respondent excepts to that conclusion of law made by the Examiner as follows:

"3. United Steelworkers of America (CIO) was on June 5, 1943, and at all times thereafter, has been the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act."

The Board exceeded its powers and erred in finding that a question affecting commerce had arisen concerning employees under Section 9 (c) of the Act and proceeded to make an illegal, arbitrary and capricious determination of an alleged appropriate unit under Section 9 (b) of the Act. Therefore, the representatives so certified pursuant to Section 9 (a) are representatives of employes in an inappropriate unit and said certification has
97 no legal force and effect under the Act. The Examiner's conclusion of law is based wholly thereon.

4. Respondent excepts to that conclusion of law made by the Examiner

"4. By refusing on June 23, 1943, and at all times thereafter, to bargain collectively with the United Steelworkers of America (CIO) as the exclusive representative of all its employees in the aforesaid appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act."

The Examiner predicates his conclusion of law upon a finding of fact that respondent has refused to bargain with representatives of employees in an alleged appropriate unit; inasmuch as said finding is based upon the Board's prior erroneous determination of an inappropriate unit, respondent's refusal to bargain is not an unfair labor practice within the meaning of Section 8 (5) of the Act.

5. Respondent excepts to that recommendation of the Examiner that would require respondent to

"2. (b) Post immediately in conspicuous places at its Otis Works plants in Cleveland, Ohio, and maintain for a period of at least sixty (60) consecutive days, from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraph 1 (a) and (b) of these recommendations, and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of these recommendations."

The recommendation and proposed order are unjustified and beyond lawful power of the Board. The recommended posting of the aforesaid notices is not within the spirit or letter of the Act and would in nowise effectuate the policies of the Act. The aforesaid recommendation, if posted as ordered, would serve only to create confusion and discord among production workers
98 who are not involved in this issue. Same also signifies to us the lack of knowledge and bias on part of Examiner in that any fair person would, at most, recommend posting only in places where it is the habit, custom or requirement of plant guards to gather.

6. Respondent excepts to the conclusion of law made by the Examiner holding that

"6. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act."

The conclusion of law made by the Examiner is not supported by any evidence in the record or finding of fact to substantiate such a conclusion.

CONCLUSION

For the reasons hereinbefore set forth respondent

(1) Moves that the complaint and first amended charge be dismissed and

(2) Petitions the Board to issue an order revoking the certification of representatives made in Case No. R-5143.

Respectfully submitted.

JONES & LAUGHLIN STEEL CORPORATION.
By W. H. HARVEY.

Dated November 4, 1943.

99 Before National Labor Relations Board

Decision and order

Signed December 2, 1943

On October 5, 1943, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the respondent filed exceptions and objections to the Intermediate Report. The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the respondent's exceptions and objections, and the entire record in the case, and hereby adopts the findings, conclusions and recommendations made by the Trial Examiner, with the additions noted below.

In its exceptions to the Intermediate Report, the respondent reiterates its contention that a unit of guards is not appropriate within the meaning of the Act, petitions that the Board's certification of the Union as the collective bargaining representative of the employees in such a unit be revoked, and moves that the complaint accordingly be dismissed. The petition and the motion are hereby denied. The respondent has advanced no argument in support of its contentions which we have not considered and rejected in previous decisions holding that plant-protection employees may constitute appropriate units for collective bargaining under the Act.[1]

The respondent further excepts to the recommendation of the Trial Examiner that it be required to post appropriate notices "in conspicuous places at its Otis Works plants," contending that the posting of such notices should be confined to the guards' quarters. We are in accord with the Trial Examiner's recommendation, and we find that the purposes of the Act will be
100 better effectuated by a general posting of notices, rather than by a posting limited to the guards' quarters.

ORDER

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Jones &

[1] See Matter of Budd Wheel Company, 52 N. L. R. B., No. 115, and cases cited therein. Matter of Jones & Laughlin Steel Corporation, 52 N. L. R. B., No. 169.

Laughlin Steel Corporation, Cleveland, Ohio, and its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Steelworkers of America (CIO) as the exclusive representative of all patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, but excluding lieutenants, captains, and supervisors;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Steelworkers of America (CIO) as the exclusive representative of all patrolmen, watchmen and firemen, including dump laborers, employed by the respondent at its Otis Works, but excluding lieutenants, captains, and supervisors;

(b) Immediately post in conspicuous places throughout its Otis Works plants in Cleveland, Ohio, including the premises occupied by its patrolmen, watchmen, firemen, and dump laborers, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is
101 ordered to cease and desist in paragraphs 1 (a) and (b) of this Order; and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of this Order;

(c) Notify the Regional Director for the Eighth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 2nd day of December 1943.

[SEAL]

HARRY A. MILLIS,
Chairman,
GERARD D. REILLY,
Member,
JOHN M. HOUSTON,
Member,
National Labor Relations Board.

102 In the United States Circuit Court of Appeals for the Sixth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

JONES & LAUGHLIN STEEL CORPORATION, RESPONDENT

Certificate of the National Labor Relations Board

Signed January 28, 1944

The National Labor Relations Board by its Chief of the Order Section, duly authorized by Section 1 of Article VI, Rules and Regulations of the National Labor Relations Board, Series 3, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record in proceedings before said Board entitled, "In the Matter of Jones & Laughlin Steel Corporation and United Steelworkers of America (CIO)," and "In the Matter of Jones & Laughlin Steel Corporation, Otis Works and United Steelworkers of America (CIO)," the same being Cases Nos. 8–C–1548 and R–5143, respectively, before said Board, such transcript including the pleadings, testimony, and evidence upon which the order of the Board in said proceedings was entered, and including the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

R–5143 (8–R–1056)

103 (1) Stenographic transcript of testimony held before Louis Plost, Trial Examiner for the National Labor Relations Board, together with all exhibits introduced into evidence.

(2) Copy of decision and direction of election issued by the National Labor Relations Board May 3, 1943, together with affidavit of service.

(3) Copy of Regional Director's report on ordered election dated May 27, 1943.

(4) Copy of certification of representatives issued by the National Labor Relations Board June 5, 1943, together with affidavit of service.

8–C–1548

(5) Stenographic transcript of testimony held before John H. Eadie, Trial Examiner for the National Labor Relations Board, together with all exhibits introduced into evidence.

(6) Copy of Trial Examiner Eadie's Intermediate Report, dated October 5, 1943.

(7) Copy of order transferring case to the Board, dated October 9, 1943.

(8) Copy of respondent's exceptions to the Trial Examiner's Intermediate Report, dated November 4, 1943.

(9) Copy of decision and order issued by the National Labor Relations Board December 2, 1943, with Trial Examiner's Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In testimony whereof the Chief of the Order Section of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 28th day of January 1944.

[SEAL]

JOHN E. LAWYER,
Chief Order Section,
National Labor Relations Board.

104 In United States Circuit Court of Appeals

Petition for enforcement of an order of the National Labor Relations Board

Filed February 1, 1944

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C. § 151 et seq.), respectfully petitions this Court for the enforcement of its order against respondent, Jones & Laughlin Steel Corporation, Cleveland, Ohio, and its officers, agents, successors and assigns. The proceedings resulting in said order are known upon the records of the Board as "In the Matter of Jones & Laughlin Steel Corporation and United Steelworkers of America (CIO), Case No. 8–C–1548" and "In the Matter of Jones & Laughlin Steel Corporation, Otis Works and United Steelworkers of America (CIO), Case No. R–5183."

In support of this petition the Board respectfully shows:

(1) Respondent is a Pennsylvania corporation, engaged in business in the State of Ohio, within this judicial circuit, where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof, certified by the Board and filed with this Court herein, to which reference is hereby

made, the Board, on December 2, 1943, duly issued an order directed to respondent, and its officers, agents, successors and assigns. The aforesaid order provides as follows:

ORDER

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Jones & Laughlin Steel Corporation, Cleveland, Ohio, and its officers, agents, successors and assigns, shall:

105 1. Cease and desist from:

(a) Refusing to bargain collectively with United Steelworkers of America (CIO) as the exclusive representative of all patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, but excluding lieutenants, captains, and supervisors;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collective through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Steelworkers of America (CIO) as the exclusive representative of all patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, but excluding lieutenants, captains, and supervisors;

(b) Immediately post in conspicuous places throughout its Otis Works plants in Cleveland, Ohio, including the premises occupied by its patrolmen, watchmen, firemen, and dump laborers, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order; and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of this Order;

(c) Notify the Regional Director for the Eighth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

106 (3) On December 2, 1943, the Board's decision and order was served upon respondent by sending a copy thereof

postpaid, bearing Government franks by registered mail, to James C. Beech, Esquire, respondent's attorney in Pittsburgh, Pennsylvania.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court a transcript of the entire record in the proceedings before the Board, including the pleadings, testimony and evidence, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring respondent, and its officers, agents, successors and assigns to comply therewith.

NATIONAL LABOR RELATIONS BOARD,
(S) HOWARD LICHTENSTEIN,
Assistant General Counsel.

Dated at Washington, D. C. this 28th day of January 1944.

DISTRICT OF COLUMBIA, *ss:*

Howard Lichtenstein, being first duly sworn, states that he is Assistant General Counsel of the National Labor Relations Board, petitioner herein, and that he is authorized to and does make this verification in behalf of said Board; that he has read the foregoing petition and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information and belief.

(S) HOWARD LICHTENSTEIN,
Assistant General Counsel.

Subscribed and sworn to before me this — day of January 1944.

[SEAL] (S) JOHN E. LAWYER,
Notary Public, District of Columbia.

My commission expires August 31, 1944.

In United States Circuit Court of Appeals

Designation by the National Labor Relation Board of portions of the record to be printed

Filed February 4, 1944

Comes now the National Labor Relations Board, petitioner herein, and, in conformity with the rules of this Court, designates the following portions of the transcript of the proceedings, the exhibits, and other papers of record herein to constitute the printed record before the Court:

I. Case No. 8–C–1548:

From		Through	
Page	Line	Page	Line
1	1	1	21
8	11	10	10
13	7	14	21
15	24	16	2
16	19	18	1
23	7	25	17
26	3	26	6
26	14	26	24
28	24	29	3

Print the following documents:

(a) Boards Exhibits: 1–C, 1–D, 1–F, 2, 4, 5, 6.

(b) Respondent's exhibits: 1, 2, 3–A.

(c) Board's Decision and Order; dated December 2, 1943.

(d) Trial Examiner's Intermediate Report; dated October 5, 1943.

(e) Respondent's Exceptions to Trial Examiner's Intermediate Report.

II. Case No. R-5143:

From		Through	
Page	Line	Page	Line
1	1	1	21
10	14	11	23
12	3	18	8
18	14	25	17
28	6	29	12
29	18	30	18
31	1	31	22

Print the following documents:

(a) Board Exhibit 1: (print the Petition for Investigation and Certification of Representatives only).

(b) Report on Ordered Election dated May 27, 1943.

(c) Certification of Representatives dated June 5, 1943.

(d) Petition for enforcement and respondent's answer thereto.

(e) This designation of record.

(S) HOWARD LICHTENSTEIN,
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C. this 28th day of January 1944.

109 In United States Circuit Court of Appeals

Designation by Respondent Jones & Laughlin Steel Corporation of additional portions of the transcript to be included in the printed record

Filed February 18, 1944

And now, to wit, this 17th day of February 1944, comes Jones & Laughlin Steel Corporation, respondent in the above entitled case, and in conformity with the Rules of this Court, designates the following portions of the transcript to be added to those heretofore designated by the National Labor Relations Board, petitioner, to be included in the printed record before the Court:

I. Case No. R-5143:

Excerpts from typewritten transcript of testimony:

From		Through	
Page	Line	Page	Line
6	15	6	18
7	5	7	20
8	11	10	13
25	18	28	5
30	19	30	24
31	23	33	20

Also print the following document:
C. I. O. Exhibit No. 1.

II. Case No. 8–C–1548:
Excerpts from typewritten transcript of testimony:

From		Through	
Page	Line	Page	Line
5	10	5	13
6	4	8	10
11	15	13	6
14	22	14	23
15	4	15	6
16	13	16	15
18	2	18	26
20	11	21	18
22	21	23	6
25	18	25	24
26	25	27	8
29	4	29	21
30	11	30	14
31	6	31	14
31	21	32	22

Also print the following document:
Respondent's Exhibit No. 4.

III. This designation of additional portions of the record.

Respondent respectfully suggests that in the printed record, the documents and testimony should be arranged as nearly as possible in chronological order.

(S) JOHN C. BANE, JR.,
(S) REED, SMITH, SHAW & MCCLAY,
Attorneys for Respondent,
JONES & LAUGHLIN STEEL CORPORATION.

111 In United States Circuit Court of Appeals

Order granting leave for Chrysler Corporation to file brief amicus curiae

Filed Sept. 11, 1944

The application of counsel for the Chrysler Corporation to be permitted to file a brief amicus curiae, is granted.

In United States Circuit Court of Appeals

Cause argued and submitted

Filed Oct. 16, 1944

Before HICKS, SIMONS, and ALLEN, JJ.

This cause is argued by F. J. Donner for Petitioner, by John C. Bane for Respondent and by T. R. Iserman for Chrysler Corporation as amicus curiae, and is submitted to the court.

112 In United States Circuit Court of Appeals

Judgment denying Board's petition for enforcement

Filed Dec. 8, 1944

On petition for enforcement of an order of the National Labor Relations Board.

This cause came on to be heard on the transcript of record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the petition for enforcement of the order of the said Board be and the same is hereby denied.

113 Nos. 9730 and 9769

United States Circuit Court of Appeals, Sixth Circuit

No. 9730

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JONES & LAUGHLIN STEEL CORPORATION, RESPONDENT

No. 9769

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FEDERAL MOTOR TRUCK COMPANY, RESPONDENT

On Petition for Enforcement of Orders of the National Labor Relations Board

Opinion

December 8, 1944

Before HICKS, SIMONS, and ALLEN, Circuit Judges.

HICKS, Circuit Judge. For these cases one opinion will suffice. No jurisdictional question is involved.

In the Jones & Laughlin case, No. 9730, the petitioner, herein called the Board, seeks the enforcement of an order directing respondent to bargain collectively with United Steel Workers of America (C. I. O.), herein called the Union, as the exclusive representative of all its patrolmen, watchmen, firemen, including "dump laborers," herein called plant protection employees, employed by respondent at its Otis Works, but excluding lieutenants, captains, and supervisors. There is included in the membership of this Union, not only plant protection employees, but production employees as well.

In the Federal Motor Truck Company case, No. 9769, the
114 Board seeks the enforcement of an order directing respondent to bargain collectively with Amalgamated Plant Protection Local No. 114, U. A. W. (C. I. O.), herein called the Union, as the exclusive representative of all its plant protection employees at its three Detroit plants, excluding the plant engineer, the assistant chief of plant protection, and all supervisory employees.

The enforcement of the orders is resisted by respondents.

These orders were based upon records made before trial examiners, including results of elections held by direction of the Board, in which the majority of the plant-protection employees, in each case, selected the Unions indicated, as their exclusive representatives for the purpose of collective bargaining with respect to rates of pay, wages, hours, and other conditions of employment. In each case the Board affirmed the reports of intermediate examiners to the effect that the employees classified as "plant protection employees" constituted appropriate units for the purpose of collective bargaining within the meaning of Sec. 9 (a) and (b) of the National Labor Relations Act.

By subdivision (b) the duty of determining the unit of employees appropriate for the purpose of collective bargaining is placed specifically and exclusively upon the Board. Pittsburgh Plate Glass Co. v. Board, 313 U. S. 146, 152. But the Board's authority in making such determination is not an absolute one—it must be exercised within the permissible limits of administrative discretion and whether it did so in these cases is the principal question for review. Marlin-Rockwell Corp. v. N. L. R. B., 116 Fed. (2d) 586, 587 (C. C. A. 2); N. L. R. B. v. Delaware-New Jersey F. Co., 128 Fed. (2d) 130, 137 (C. C. A. 3); N. L. R. B. v. Botany Worsted Mills, 133 Fed. (2d) 876, 880 (C. C. A. 3).

In determining an appropriate unit for collective bargaining, the Board is required by Sec. 9 (b) to consider whether its order will insure employees the full benefit of their rights to self-organization and collective bargaining, and this involves the inquiry as to who are "employees," or to be more specific, whether "plant protection employees" are entitled to the benefits of the Act. Here, the Board must give consideration to Sec. 2 (2) and (3). Subdivision (3) provides that "the term 'employee' shall include any employee * * *," but subdivision (2) provides that "the term 'employer' includes any person acting in the interest of an employer directly or indirectly. * * *"

115 Plant protection employees are "employees" when considered in their relationships to their employer [N. L. R. B. v. Skinner & Kennedy S. Co., 113 Fed. (2d) 667, 671 (C. C. A. 8)] but we find it difficult to determine that they are "employers" when their relationship to their fellow employees is considered. However, under the facts pertaining to their duties as hereinafter set forth, we are unable to say that the Board exceeded the limits of its discretion in determining that plant protection employees are entitled to the protection of the Act. We think that, in determining this question, the Board properly accepted for its guidance the underlying economic facts of the cases in hand. Board v. Hearst Publications, 322 U. S. 111, 129; N. L. R. B. v. Blount,

131 Fed. (2d) 585, 590 (C. C. A. 8); N. L. R. B. v. Gluck Brewing Co., 144 Fed. (2d) 847, 855 (C. C. A. 8).

The question as to who are employers or employees under the Act is usually presented in cases where some person or agency acting either directly or indirectly for the employer interferes or seeks to interfere with the rights of employees to organize. I. A. of M. v. Labor Board, 311 U. S. 72; N. L. R. B. v. Taylor-Colquitt Co., 140 Fed. (2d) 92 (C. C. A. 4). That situation is not presented here.

Nevertheless the Board could not stop with its finding upon the facts that plant protection employees are entitled to the benefits of collective bargaining. It is required under Sec. 9 (b) to go further and determine whether the unit or units selected for that purpose would effectuate "the policies of Sec. 151–166 of this Title. * * *" In both cases respondents concede, as they must concede (Pittsburgh P. Glass Co. v. Board, supra) that the Board had wide discretion in determining whether the units selected were appropriate, and if so, whether their selection effectuated the policies of the Act. But each respondent has insisted from the beginning, and now insists, that in making such determinations the Board went clearly beyond the limits of its discretion. If this is true, the orders are invalid as a matter of law. Pittsburgh P. Glass Co. v. N. L. R. B., 113 Fed. (2d) 698, 704 (C. C. A. 8), affirmed 313 U. S. 146, 152; Midland Steel Products Co. v. N. L. R. B., 113 Fed. (2d) 800, 805 (C. C. A. 6).

We are confronted with a preliminary inquiry into the nature of the policies of the Act. These are set forth in its preamble [Title 29, Sec. 151 U. S. C. A.] and we need not repeat them. It is sufficient to say that the fundamental purposes of the Wagner Act are to eliminate and prevent obstructions to the free flow
116 of interstate commerce (Labor Board v. Fansteel Corp., 306 U. S. 249, 257) and that in its administration, the Board acts in a public capacity and in the public interest.

In National Licorice Co. v. Labor Board, 309 U. S. 350, at page 362, the court said:

"The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. Amalgamated Utility Workers v. Consolidated Edison Co. ante, p. 261; H. Rept. No. 1147, 74th Cong., 1st Sess., Committee on Labor, p. 24; cf. Federal Trade Commission v. Klesner, 280 U. S. 19. It has few of the indicia of a private litigation and makes no requirement for the presence in it of any private party other than the employer charged with an unfair labor practice. The Board acts in a public capacity to give effect to the declared

public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining. * * *"

In Amalgamated Workers v. Edison Co., 309 U. S. 261, at p. 265, the court said:

"The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce."

In Board v. Hearst Publications, supra (p. 123) the court said:

"The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale."

In N. L. R. B. v. Colten, 105 Fed. (2d) 179, 182, we said:

"This contention, however, ignores the essential nature of regulatory statutes of the class here considered, and the scope and purpose of administrative orders made in exercise of powers conferred by such legislation. They are to implement a public social or economic policy not primarily concerned with private rights, and through remedies not only unknown to the common law but often in derogation of it."

117 This statement was in substance repeated in Consumers Power Co. v. N. L. R. B., 113 Fed. (2d) 38, 44 (C. C. A. 6).

In selecting appropriate units for collective bargaining, the duty of the Board to consider the public interest as a material factor is not different from that imposed upon it in the administration of any other feature of the Act. It must consider the public interest and may not delegate its authority in this respect. See Marshall Field & Co. v. N. L. R. B., 135 Fed. (2d) 391, 393 (C. C. A. 7). To assist it in arriving at a conclusion, it may, under Sec. 9 (c) of the Act (29 U. S. C. A., Sec. 159 (c)) take a secret ballot of employees, but it is not compelled to do so. Marlin-Rockwell Corp. v. N. L. R. B., supra (p. 587). In case an election is held, the Board should consider the will of the majority of the employees, but the result of the election does not altogether conclude the matter. In N. L. R. B. v. Delaware-New Jersey F. Co., supra (p. 137), the court said:

"But the point here is, not what the officers want, not what the men want, nor what the company either wants or is willing to acquiesce in, but rather what is the public interest."

This statement had approval in Glen Alden Coal Co. v. N. L. R. B., 141 Fed. (2d) 47, 50 (C. C. A. 3).

We think that in each order under review the Board failed to give adequate consideration to the national welfare and this is a fundamental error. In adopting the conclusions of the trial

examiners that the Unions selected by a majority of the plant protection employees were appropriate, the Board failed to give effect to the fact that from December 11, 1941, the country was at war, a fact which we judicially know, and it failed to consider the further unquestioned fact that each respondent was engaged in the production of war material and other necessities for the armed forces and the national war effort.

We proceed to consider the undisputed facts in each case.

In the Jones & Laughlin case, No. 9730, the respondent on June 30, 1942, acquired and began to operate two steel plants in Cleveland, known as the "Otis Works." In that year it produced in these plants one million tons of its products. It employed approximately 4700 men and women in its mills and buildings; to protect its investments in these plants and to keep peace and preserve order among its employees, it maintained a force of uniformed plant guards, consisting of a captain, eight lieutenants, fifty-eight patrolmen, two fire captains, two firemen and two "dump laborers" who performed plant protection work. It was the duty of the guards to keep out intruders; to see that the rules and regulations of respondent were observed within the plant for the benefit of all concerned, and to act as conservators of the legal rights of respondent. They had the additional responsibility of carrying out the orders of the management, often of a confidential nature. The duties of the fire captains and firemen are indicated by their titles.

In the Federal Motor Truck Co. case, No. 9769, the respondent in 1942 operated three plants in Detroit in the exclusive production of motor trucks, bodies, cabs and parts for use in the war effort. In that year it delivered finished products to points outside of Michigan of the approximate value of $25,000,000.00. It had about 660 production employees and about 18 plant protection employees. The duties of these employees were substantially similar to the guards or watchmen in the Jones & Laughlin plants. It was their duty to identify all workmen, trucks and cars that entered or left the plant; to examine the parcels and lunch boxes of the employees; to escort railroad cars into the yards; to make recommendations as to the discharge of employees and to make arrests, without warrants, for violation of the Sabotage and Espionage Acts.

In common with similar watchmen or guards employed in the Jones & Laughlin plants, they carried arms, wore uniforms, were organized into companies and were militarized. They were styled Auxiliary Military Police and were commanded, drilled and instructed as such. They were required to enter into an agreement with the United States that they would well and faithfully discharge their duties in the protection of war materials and utilities,

and would obey any orders in connection therewith issued by the President as Commander-in-Chief, or his duly authorized officers, and would be governed by the Articles of War and would subject themselves to military law. They were required to take the usual oath incident to induction into the Army.

Upon the other hand, when they were inducted into the Unions and became subject to their orders, rules and decisions, the plant protection employees assumed obligations to the Unions and their fellow workers, which might well in given circumstances bring them in conflict with their obligation to their employers, and with their paramount duty as militarized police of the United States Government.

119. The national welfare is of supreme importance and especially is this true in time of war. The evidence reflects the deep concern of the Government for the maintenance and protection of respondents' plants and for the integrity and volume of their products.

If these matters were given consideration by the Board it was nowhere reflected in any of its orders or decisions. It contented itself with the adoption of the reports of trial examiners that the units selected were appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours and other conditions of employment. It nowhere finds that the bargaining units were selected in deference to the imperative public interests. Assuming that the units selected would in their negotiations have due regard for the national welfare, such an assumption would not satisfy the statute.

The Board, under Sec. 9 (b) had a positive duty to perform in the interest of the public. It must be kept in mind that in time of national peril, the preservation, protection and promotion of the national welfare is the paramount objective; and the Board must select bargaining agents with this in view. It must anticipate that the Union selected as agent would negotiate through individual members who had a common interest with the employees in securing for themselves advantageous agreements with respect to hours, wages and other conditions of employment. It is manifest that these personal interests of the bargainors, as well as the demands made upon them either by the employees or employers might necessarily constitute a serious and embarrassing handicap when it came to the consideration of the interest of the public. When these particular Unions were selected as bargaining agents for the plant protection employees, these employees might in an effort to discharge their duty to their employer find themselves in conflict with other members of their Union over the enforcement of some rule or regulation they were hired to enforce; or upon the other hand, in conflict with the Federal Government

because of fealty to the Union at the time of a dispute involving the public interest. We think that the imposition of such strains upon personal allegiance and personal interest would undoubtedly be detrimental to the public interest and to the free flow of commerce.

Confining ourselves to the facts of these particular cases, we conclude for the reasons indicated, that the applications to enforce the orders under review should be, and they are, therefore denied.

120 In United States Circuit Court of Appeals

Order extending time for filing petition for rehearing

Filed Jan. 8, 1945

In these cases the petitioner, National Labor Relations Board, is allowed until and including January 8, 1945, within which time to file its petition to rehear.

121 In the United States Circuit Court of Appeals for the Sixth Circuit

Nos. 9730 and 9769

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JONES & LAUGHLIN STEEL CORPORATION, RESPONDENT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FEDERAL MOTOR TRUCK COMPANY, RESPONDENT

Petition of National Labor Relations Board for rehearing

Filed Jan. 8, 1945

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

The National Labor Relations Board respectfully petitions this Honorable Court for a rehearing in the above-entitled causes and respectfully shows to the Court as follows:

On December 8, 1944, the Court issued an opinion in the above-entitled causes in which it denied enforcement to orders of the Board requiring respondents to bargain with labor organizations representing separately constituted bargaining units of plant pro-

tection employees at each of respondents' plants. In our
122 view, these decisions are of great importance because they so alter basic labor relationships in wartime as to threaten the public interest. In its briefs in both cases the Board was concerned with respondents' contentions that plant protection employees are not employees within the meaning of the Act, since these were the contentions primarily pressed upon the Board, rather than with the impact of the militarized status of the plant protection employees upon the bargaining unit or the type of bargaining agency which the employees may select. Because the Court denied enforcement to the Board's orders for the latter reasons only, we present here considerations which we believe were either inadequately or not at all presented to the Court concerning the relationship between the militarized status of the guards, the bargaining unit and the type of bargaining agency selected, and the national welfare.

I

The Court's decisions holding that the public interest requires denial of the Board's bargaining orders are inconsistent with authoritative military regulations which endorse the bargaining procedures involved not only in this case but in some 175 others. Thus, on March 17, 1943, the War Department issued from the Headquarters of the Army Service Forces its Circular No. 15 in which the military authorities charged with the security of industrial plants throughout the nation laid down regulations governing the status of plant protection employees enrolled in the auxiliary military police of the type involved here.[1]
123 Under the heading "Labor Relationships," these regulations spell out the type of collective bargaining relationship deemed consistent with security. Section 6 h (2) of the regulations provides (No. 9769, R. 86):

"Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police. In view of recent decisions by the National Labor Relations Board (see In re Lord Mfg. Co. v. United Rubber Workers of America, CIO, Case No. R-4820, February 1943), the Auxiliary Military Police should be represented in collective bargaining with the management by a bargaining unit other than that composed of the production and maintenance workers, although both bargaining units may be affiliated with the same labor organization. Where the guards are not now included in the same bargaining unit, this is mandatory; where the guards are included in such unit, serious

[1] These regulations appear in the record of No. 9769 at pp. 75–96.

consideration will be given to effect a change to conform to the foregoing policies."

It is evident from the foregoing that the military authorities view the collective-bargaining relationship as one appropriate to the status of plant-protection employees and consistent with their security functions. Likewise, the interests of security do not require, in the view of the military authorities, that the bargaining agent be a different one from that representing the production and maintenance workers. Considerations of security do, however, require that the bargaining unit into which plant-protection
124 employees are grouped be confined to such employees and that such unit be separate from bargaining units of production and maintenance employees. In adopting this precaution, the Army Service Forces expressly followed[2] the Board's decision in Matter of Lord Manufacturing Company (47 N. L. R. B. 1032, decided February 25, 1943). This case is one of a series of cases in which the Board itself, even before the issuance of the regulation above adverted to, abandoned its normal determinants for the shaping of units of guards and production workers, such as the functional coherence between the two kinds of work, the history of bargaining, whether on a differentiated or joint basis, and the desires of the organizations involved.[3] Instead, the Board, in explicit deference to the wartime status of plant-protection employees, laid down a fixed administrative policy of confining plant-protection employees in plant engaged in war work to a bargaining unit separate from a unit of production workers.[4] It
125 was this administrative policy, initiated by the Board in order to accommodate collective bargaining to the exigencies of war production, which the military authorities adopted. It

[2] See No. 9769, R. 86–87.

[3] See Third Annual Report of the National Labor Relations Board (Government Printing Office, 1938), pp. 184–190.

[4] "The manner in which recognition of wartime conditions molded prior discretionary consideration in this area into a settled administrative policy is seen from two cases, Matter of U. S. Electric Motors, Inc., 45 N. L. R. B. 298 (October 31, 1942), and Matter of Julius Petersen, 46 N. L. R. B. 1049 (January 13, 1943), both of which are cited in the Lord decision. In the former case, the only labor organization involved in the proceeding sought to include the plant guards within a unit of production and maintenance employees. The Board noted (45 N. L. R. B. at 300) that the guards have recently been inducted as civilian members of the Auxiliary Military Police with a dual responsibility to the company and to the military authorities for the general safety of the plant." The Board then pointed out, "At the request of the only labor organization involved in a representation proceeding, the Board has frequently included ordinary watchmen in a single industrial unit with production and maintenance workers. Under present conditions at the plant, and in the absence of any precedent of past bargaining between the Company and its employees including watchmen, we shall exclude guards from the unit composed of regular production and maintenance employees." In the Petersen case a C. I. O. union sought the inclusion within a unit of production employees of armed guards subject to the regulation of the United States Coast Guard, while an A. F. of L. organization proposed that they be excluded. After noting their security functions, the Board stated (46 N. L. R. B. at 1054): "For reasons we have set forth in other decisions, we have held that such plant protection employees are advisedly excluded from units of production employees and are properly included in a bargaining unit restricted to employees of their class. We shall therefore exclude plant protection employees from the unit for general production and maintenance employees and shall include them, excepting their captain, in a separate unit for bargaining purposes."

is to be further noted that although in the Lord case the organization which sought to represent the guards was different from that representing the production workers, the military authorities declined to impose such organizational differentiation as a security requirement in collective bargaining but, on the contrary, expressly permitted "the same labor organization" to represent both bargaining units.

Because the term, "the same labor organization," as used in Circular No. 15, involved an ambiguity, a clarifying
126 memorandum was issued by the War Department on July 10, 1943, for the commanding generals of all service commands. This memorandum[5] states:

"1. It has been reported to the headquarters that labor officers are interpreting Circular No. 15, this headquarters, 17 March 1943, subject, 'Auxiliary Military Police,' as prohibiting membership of plant guards enrolled as Auxiliary Military Police in the same trade union local as that representing production and maintenance workers.

"2. Paragraph 6 (h) (2), Circular No. 15, presents applicable War Department policy on plant guard labor representation.

"3. In the event that plant guards enrolled as Auxiliary Military Police desire to be represented in collective bargaining with the management, they should be represented by a bargaining unit other than that representing the production and maintenance workers. However, in such event, *both bargaining units may be affiliated with the same trade union local*, provided they are, in fact, separate bargaining units." [Italics supplied.]

This document makes it apparent that, once plant protection employees are segregated in a separate bargaining unit, the requirements of security are fully met and not only may the same international union represent them which represents the production workers but they are free to select the same local union which represents the production workers.

The instant cases therefore fall well within the Army's
127 security requirements. In the Federal Motor case not only did the Board prescribe a separate bargaining unit but the union involved was a local limited only to plant protection employees (R. 22–23). In the Jones & Laughlin case the unit also excluded production workers and the International Union, which sought to represent them, undertook, as the Board found, to bargain for the plant protection employees separately (R. 74). (And we are informed by our Regional Office that the International Union, involved in the Jones & Laughlin case, chartered a separate local for plant protection employees.)

[5] Printed in full as Appendix A.

It would thus appear that the Court's decisions, if left standing, would condemn the Board as arbitrary in cases in which the unit is shaped not only in accordance with the views of the security authorities but in which additional safeguards assure effective accommodation of the collective bargaining rights of plant protection employees to their wartime responsibilities. In so deciding the Court has, inadvertently we believe, not only substituted its judgment for that of the Board and the military authorities but has also exposed wartime commerce to the very perils of interruption which Congress in the National Labor Relations Act has sought to prevent by promoting freedom of choice.

II

Congress has imposed upon the Board the duty so to fashion bargaining units as "to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act." Section 9 (b).
128 But the Board does not hew to the statutory objective single-mindedly and without regard to other aspects of Federal policy. In the present case the Board has carefully framed an area of accommodation between the objectives of the statute and the requirements of war production. We submit that the Court has not only overlooked this fact but, in insisting that the key statutory value of free choice itself be abandoned in the public interest, has also ignored the effects upon wartime production of a denial of free choice.

"The policies of this Act" apply with a peculiar urgency to a nation at war. The need for uninterrupted war production may not be viewed as a secondary consideration to be lightly jeopardized by the creation of barriers to that freedom of choice which Congress has deemed essential to an undisturbed commerce. The fact that militarization has imposed greater restrictions upon the plant-protection employees has not been deemed by the military authorities themselves a reason for denying them the benefits of the Act.[8] Indeed, the surrender by plant-protection employees of traditional rights and their submission to novel restraints emphasize rather than relax the need for maintaining the integrity of the right of choosing a bargaining representative, for the
129 bargaining process is then the only way in which problems

[8] The Board has been informed by representatives of the Army Service Forces that in accordance with the Army's policies of restoring civilian controls to industry wherever possible, the militarization program has been contracted from 15,000 to 3,000 plants and that the number of guards militarized has fallen from 190,000 to between 50 and 60 thousand. Pursuant to this policy, the Jones & Laughlin plant involved in this proceeding has already been demilitarized and the Federal motor establishments here involved have been, or are in the process of being demilitarized.

arising out of the relationship may be defined and solved.

The Court's decisions hold that plant protection employees are not to have "unions of their own choosing." Its holding that broader considerations of national safety require such an extraordinary result cannot be reconciled with authoritative Army regulations which plainly reflect an unwillingness, because of any fears of a division in allegiance, to break down the exercise by plant protection employees of their rights under the statute and to expose war plants to consequent labor unrest.

Insofar as the decisions reflect the view that membership in the unions here involved will jeopardized the loyalty of the guards to their employer; it should be pointed out that as long ago as 1937, the Supreme Court[7] rejected an analogous contention by pointing out, as the Board did in these cases, that the Act in no way limits the power of discharge for improper performance of duty.[8] In addition, *bargaining contracts for plant* guards impose upon them special responsibilities and take cognizance of their peculiar
130 status. An examination of more than fifty contracts[9] between production workers' unions and employers engaged in war production covering militarized guards and related workers discloses that the unions involved are fully aware of the responsibilities of armed guards.

Thus, a standard provision in such contracts states that nothing therein should be construed to abrogate or interfere with the War Department's control over such employees or their duties and responsibilities as auxiliary military policemen.[10] Production unions likewise agree that the guards perform their assigned duties "impartially and without regard to any union or nonunion affiliation or activities." The unions involved further agree to respect the confidential character of information which guards may acquire, to refrain from strikes, stoppages, or interruptions of work. Of particular significance here is a frequent undertaking by production unions representing plant protection employees that in the event of a strike of production workers, the guards will continue to
report for duty, remain at their posts and discharge their
131 assigned duties in the usual manner. Finally, characteristic of these contracts are provisions that failure on the part of

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[7] See Matter of Budd Wheel Co., 52 N. L. R. B. 660, 670, and compare In re Youngstown Sheet & Tube Co., decision of Regional Board VI of the War Labor Board, Case No. 111-3602-D, decided April 7, 1944, 15 War Labor Rep. 509, in which the latter Board awarded a union of production workers representing plant guards a maintenance of membership contract and rejected a contention similar to that which forms the basis of the court's decision.

[8] In Associated Press v. N. L. R. B., 301 U. S. 103, 131-132.

[9] These documents are on file in the Industrial Relations Division, Bureau of Labor Statistics, Department of Labor. Relevant and typical selections from them are set out in Appendix B.

[10] Such a provision is printed in full in Appendix B. See also In re Brewster Aeronautical Corp., decision of National War Labor Board, Case No. 111-3372-D, decided September 24, 1943, 11 War Labor Rep. 286, and In re Great American Industries, decision of Regional Board IV of the War Labor Board, Case No. 111-467-C, decided August 27, 1943, 11 War Labor Rep. 287.

any plant protection employee "to observe and fulfill work responsibilities shall be just cause for discipline by the company up to and including summary dismissal."

The Army regulations and scores of Board decisions in this field have given rise to a bargaining structure which the Court's decisions destroy. If the decisions remain standing, this delicate and difficult area of labor relations will be subject to the explosive consequences which a denial of free choice necessarily entails. Moreover, existing bargaining contracts, grievance procedures, and other mechanisms of adjustment are swept away. An invitation is extended for the launching of new unions and of new organizing drives in war plants. A justification is supplied for the invasion of plants already organized by one union of production workers by another production workers' union for the purpose *of organizing plant guards*. Such a situation in a plant means not only poor labor relations but makes possible serious interunion rivalries. Problems of union recognition, highly productive of industrial disputes,[32] will be precipitated in the nation's war plants. And in limiting the statutory rights of plant guards, the decision can only serve to intensify manpower problems and to demoralize both guards and production workers by insisting that, as a matter of law, their self-interest is greater than their patriotism.[33]

Finally, the decision undermines the entire stabilization program for plant guards. Scores of contracts already approved by the War Labor Board in which production workers' unions represented plant guards are now condemned.[34] Solution of pressing wage and union security problems in cases now pending before the War Labor Board must be deferred until the underlying bargaining procedures conform to the Court's decision.[35]

War production must be protected from these consequences; the public interest in an undisturbed commerce, which the statute safeguards, is consistent with the national welfare which is the Court's concern.[36]

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[32] In the past two years and a half 15 volumes of its decisions, the Board has decided no less than 175 cases in which it has approved a bargaining pattern of the type here involved. These cases are collected in Appendix C.

[33] U. S. Dept of Labor, Bulletin No. 782, Strikes in 1943 (Washington, D. C., 1944), p. 18.

[34] That this is no mere speculation, see the Youngstown Sheet & Tube case, supra.

[35] Both in regional proceedings of the War Labor Board in Detroit and in national Board proceedings in Washington, employers have sought on the basis of the court's decision to suspend processing by the War Labor Board of cases involving plant guards.

[36] The cases cited by the court which stress the "public" aspect of the statute in no way minimize the importance of freedom of choice. They contrast private rights not with an undifferentiated and undefined public welfare but with the public interest in a free flow of commerce which forms the basis of the statute. And far from holding that extrastatutory considerations limit the powers of the board, as the court suggests, these cases expand the powers of the board precisely because of the public importance of the statutory objectives.

III

The Court's decisions may not be justified by any asserted
133 defect in the Board's findings or any failure by the Board properly to balance the statutory rights of the plant guards against the special responsibilities which wartime conditions impose upon them. In both of these cases the Board found that the unit which it selected is "appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act" (No. 9769, R. 26; No. 9730, R. 74). In both of these cases the Board found that respondents' refusals to bargain with the respective unions "tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce" (No. 9769, R. 10; No. 9730, R. 88). We submit that these findings give effect "to the imperative public interests" which the Court claims the Board has slighted in a concrete and important way. How could uninterrupted war production be assured if other interests required the Board to disregard conduct which, as declared by the statute, burdens and obstructs commerce in the goods produced?

At the other end of the scale, the Board gave full recognition to the special wartime role of plant guards. Thus, as we have already noted, it deviated from its administrative norms and put into effect its wartime policy of placing such guards in separate units. In both cases, moreover, the Board noted the special character of plant guard functions and the relationship of the plant guards to the United States Government (No. 9730, R. 73; No. 9769, R. 25). In both cases the Board adverted to its prior administrative decisions rejecting the reasons for denying controlling effect to the considerations deemed determinative by the Court (No. 9730, R. 73–74, 99; No. 9769, R. 26).

134 The decisions cited by the Board establish that the Board's instant determinations are not casual and unconsidered, as the Court suggests, but a specific application of a developed administrative policy in which contentions with respect to the wartime status of guards have been weighed against the statutory objectives. Thus, in Matter of Chrysler Corp., 44 N. L. R. B. 881, 885–886,[*] the Board placed plant guards in a separate bargaining unit and noted that "The present production of war materials at the Company's plants increases the importance of their work and their responsibilities." The Board then rejected the argument which forms the basis of the Court's decisions in the following language:

"The Company further contends that the Board should dismiss this proceeding on the ground that the organization of plant-

[*] Cited by the board in No. 9730, R. 74; see also No. 9769, R. 26.

protection employees and their affiliation with the same labor organization which represents the Company's production and maintenance employees, whose activities they watch and guard, has materially lessened the efficiency of the former. We perceive no necessary conflict between self-organization for collective bargaining and the faithful performance of duty. Freedom to choose a bargaining agent includes the right to select a representative whic hhas been chosen to represent other employees of the employer in a different bargaining unit. We are mindful of the increased responsibilities placed upon plant-protection employees in wartime, but the practices and procedures of collective
135 bargaining are flexible and may make full allowance for such added responsibilities.[7] If, in the instant case, the plant-protection employees select a local affiliated with the International to represent them as bargaining agent, it will be incumbent upon the International to impose a proportionate responsibility upon both organized groups of employees in order that their respective duties may be adequately and impartially performed. In any event, the remedy for inefficiency or wilful disregard or neglect of duty on the part of the plant-protection employees lies implicitly in the power of the Company to discipline or discharge them and in the power of the military authority to take all necessary steps to protect the public interest. We find, therefore, no reason to deny the request of the Company's plant-protection employees to constitute a separate bargaining unit and to deny them, as such, the right to bargain collectively with their employer through a representative of their own choosing."

The care with which the Board has treated this problem and its consciousness of the considerations involved is also manifest from its decision in Matter of Dravo Corp., 52 N. L. R. B., 322, 327–328.[17] In the Dravo case the Board not only segregated the guards from production workers for bargaining purposes
136 but separated a unit of guards who were militarized from those who were nonmilitarized. If thus indicated the reasons for its decision:

"The second argument raised by the Company deals with a possible conflict of interest which may arise when plant-protection employees join a labor organization. We give no weight to the implication that membership in a union tends to undermine the honesty of plant-protection employees or their competence to execute their duties satisfactorily. Self-organization for collective bargaining is not incompatible with efficient and faithful dis-

[7] See also *Matter of Frigidaire Division, General Motors Corporation*, and *United Electrical, Radio & Machine Workers of America*. (C. I. O.), 39 N. L. R. B. 1108, and cases cited therein [Board footnote]

[17] Referred to by the board in No. 9730, R. 99.

charge of duty. Should the performance of an employee deteriorate, the Company always has recourse to its normal disciplinary authority to insure the maintenance of its standards of work.

We come now to the question whether the militarization of guards alters the character of their employment. It cannot seriously be contended at this time that guards who are sworn into temporary membership in the armed services lose thereby any of the benefits of the Act.[6] On this issue, the petitioner and the Company are far apart in their contentions, the Union arguing that the fact the guards are sworn into reserve membership in the armed services is no reason for segregating them from other employees, whereas the Company urges that this should prevent these employees from being represented by any union which represents any other category of personnel employed by the corporation. In our view, neither contention can be supported.

137

We cannot regard the induction of the guards into the Coast Guard Reserve as a meaningless act, since it does indicate that such persons from the nature of their oaths then owe allegiance directly to the Government, as well as to the corporation. The services do not contend, however, that such persons thereby become Government employees and are therefore outside the provisions of the Act. Nor would the facts in this case support such a contention, for it is clear that the wages and duties of this group of personnel remained unchanged after their induction so that it is apparent that the proximate relationship of employer and employee still exists between the Company and the guards.

"We therefore feel constrained to hold that the guards, as well as other employees, are free to select their own bargaining representatives under the Act.

"The militarization of plant-protection employees, while no obstacle to unionization, is nevertheless significant. As civilian auxiliaries of a military force, the guards have greater duties and obligations than have those plant-protection employees who are not militarized. To the end that the guard may be better able to function within the military sphere, and to permit the military authorities to exercise greater control over the guards, we shall establish a bargaining unit for all militarized plant-protection employees separate and apart from those who are nonmilitarized. We contemplate that the separation of the bargaining units in their negotiations with the Company and their day-to-day activities will be one of fact, not merely form. Since the petition for the nonmilitarized plant-protection employees does not raise the problem of merging them with the main unit of

138

[6] See Matter of Consolidated Steel Corporation, Ltd., 57 N. L. R. B. 333, and cases cited therein. [Board footnote.]

production and maintenance employees, we find it unnecessary to decide that question here."

Finally, in Matter of Budd Wheel Co., 52 N. L. R. B. 666, 669–672,[18] the Board again enunciated administrative policy with respect to plant guards. It pointed out that in prior cases it had "consistently placed plant guards in units separate and apart from any unit of production and maintenance employees." In rejecting a contention that it would not effectuate the policies of the Act to order the Company to bargain with a union representing the guards, the Board stated:

"The declared policy of the Act is 'to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred.' Among the obstructions set forth in the Act are 'strikes and other forms of industrial strife or unrest' and 'inequality of bargaining power.' It can hardly be seriously contended that such obstructions result only from conflict between production employees and the employer. Nor do we believe that the war has eliminated all these obstructions; on the contrary, strife and unrest and inequality of bargaining power are likely to continue in the absence of collective bargaining, particularly in the face of self-imposed limitations on the right to strike and, in the case of militarized guards, the necessary restrictions imposed by the Government."

The Board's determinations in the instant cases are an expression of a policy which has been applied in the foregoing and in scores of other cases.[19] They cannot be viewed, as the Court appears to, as an administrative lapse occasioned by an unconsidered and routine treatment of a new problem. They may not be wrested out of their context nor may the Board be placed in default because it did not repeat every argument which its administrative policy rejects or every consideration upon which it is based. Cf. Securities and Exchange Commission v. Chenery Corp., 318 U. S. 80; N. L. R. B. v. Regal Knitwear Co., 140 F. (2d) 746 (C. C. A. 2), certiorari granted on another point, 65 Sup. Ct. 35.

The Board has tested this administrative principle against the record facts in case after case. But the Court has discarded it not on the basis of any fact but solely because of its belief that it would "undoubtedly" injure the public interest. We cannot believe that administrative policy, so evolved, should be brushed aside by a court without a more substantial showing of impropriety, par-

[18] Cited in No. 9730, R. 99.

[19] See National Labor Relations Board, Seventh Annual Report (Gov't Print. Off., 1943), p. 63; Eighth Annual Report (Gov't Print. Off., 1944), p. 57.

ticularly where to do so involves a sacrifice of the statutory principle of free choice and a concomitant threat to war production.

Wherefore, it is prayed that a rehearing of these cases be
140 granted, because of the great importance of the issue involved, and that on such rehearing the orders of the Board be enforced.

Respectfully submitted.

ALVIN J. ROCKWELL,
General Counsel,
MALCOLM F. HALLIDAY,
Associate General Counsel,
FRANK DONNER,
Attorney,
National Labor Relations Board.

JANUARY 1945.

CERTIFICATE OF COUNSEL

Comes now Alvin J. Rockwell, General Counsel for the National Labor Relations Board, and certifies that he has read and knows the contents of the foregoing petition, and that said petition is filed in good faith, and not for purposes of delay.

Alvin J. Rockwell.
ALVIN J. ROCKWELL.

WASHINGTON, D. C., *January 1945.*

141 APPENDIX A

WAR DEPARTMENT,
HEADQUARTERS, ARMY SERVICE FORCES,
Washington 25, D. C. 10 July 1943.

MEMORANDUM FOR COMMANDING GENERALS, ALL SERVICE COMMANDS

Subject: Plant guards.

1. It has been reported to this headquarters that labor officers are interpreting Circular No. 15, this headquarters, 17 March 1943, subject, Auxiliary Military Police, as prohibiting membership of plant guards enrolled as Auxiliary Military Police in the same trade-union local as that representing production and maintenance workers.

2. Paragraph 6 (h) (2), Circular No. 15, presents applicable War Department policy on plant guard labor representation.

3. In the event that plant guards enrolled as Auxiliary Military Police desire to be represented in collective bargaining with the management, they should be represented by a bargaining unit other

than that representing the production and maintenance workers. However, in such event, both bargaining units may be affiliated with the same trade-union local, provided they are, in fact, separate bargaining units.

SPX 231.4 (6 Jul 43) SPGCL-MB-E-M.

By command of Lieutenant General Somervell:

J. A. ULIO,
Major General, Adjutant General.

I hereby certify this to be a true copy of the original.

(S) Sidney C. Sufrin,
SIDNEY C. SUFRIN,
Lt. Col., CMP.

142 APPENDIX B

SELECTIONS FROM CURRENT CONTRACTS BETWEEN PRODUCERS OF WAR MATERIALS AND PRODUCTION UNIONS REPRESENTING MILITARIZED GUARDS ILLUSTRATING CLAUSES INSURING THE PROPER PERFORMANCE OF THE PROTECTION FUNCTION

Curtiss-Wright Corporation, Airplane Division—Buffalo Plants, Cheektowaga and Tonawanda, New York, and Victory Lodge 1661, District 76, of the International Association of Machinists (A. F. of L.)

ARTICLE V

PRIME MILITARY RESPONSIBILITY

It is understood that for the duration of the war this Agreement is, in all respects, subject to the provisions of the directives of the War Department concerning Military Organization of Plant Guard Forces (W. D. Directive, July 2, 1942, AG 231.43; SOS Circular 52, August 28, 1942; and amendments thereto), and nothing in this Agreement shall be construed in any way to interfere with the organization, training, and control by the War Department of the Employers' guard force as an Auxiliary to the Military Police, nor shall it operate to abrogate or interfere with the duties, responsibilities, and rights imposed by the War Department upon any employe in such Auxiliary Military Police.

(The above clause is contained in all contracts covering military guards on file with the Department of Labor.)

143 ARTICLE VII

STRIKES AND LOCK-OUTS

It is agreed that it is the purpose and intent of the parties hereto that all grievances or disputes arising between them over the interpretation or application of any of the terms of this Agreement shall be settled by the procedure set forth in Article XXI hereof.

The Union agrees that during the term of this Agreement there shall be no strikes, slow-ups, slow-downs, sit-downs, sympathy strikes, picketing, stoppages of work, or any other form of interference with production or other operations. The guards shall continue to discharge their duties even though other employes of the Employer may be on strike or picketing. The Employer reserves the right to cancel this Agreement in the event of any violation of this article or Article XI, and in addition, any individual or group violating the above may be discharged. The Employer agrees there shall be no lock-outs.

Bell Aircraft Corporation, Georgia Division, Marietta, Ga., and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 513 (C. I. O.)

ARTICLE V

RULES FOR GUARDS

1. The Union and its members recognize that it is the responsibility of the Guards to familiarize themselves with the established plant rules and to faithfully report all violations of these

144 2. The Union and its members agree that the guards shall discharge their assigned duties impartially and without regard to any Union or Non-Union affiliation or activities of any Company employee or employees, and that failure to do so will constitute cause for disciplinary action.

3. The Union and its members agree that every Guard shall keep confidential and not divulge to any person other than the Management of the Company (or the United States Army if so required during the war emergency) all confidential information involving plant security obtained from any source which has any bearing upon the Company and its plants, its operations, or personnel.

4. The Union and its members agree at no time to engage in any strike, work stoppage, sit-down or picketing, or any other activity which may interrupt their protection of the Company's premises or employees.

5. The Union agrees that, in the event of any strike, work stoppage, slow-down, picketing, or any other interruption of or inter-

forego with production of the Company at any of its plants caused by or engaged in by other employees of the Company, the employees who are members of the Union will continue to report for duty, remain at their posts, and, in the regular manner, discharge their duties assigned to them.

6. The Union agrees that failure on the part of any employee or employees to observe and fulfill such responsibilities shall be just cause for discipline by the Company up to and including summary dismissal.

* * * * * * *

115 Curtiss-Wright Corporation, Airplane Division, Columbus Plants, Columbus, Ohio, and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Curtiss-Wright Local 927

ARTICLE VII

STRIKES AND LOCK-OUTS

The Union agrees that during the term of this Agreement there shall be no strikes, slow-downs, sit-downs, sympathy strikes, picketing, stoppage of work, or any other form of interference with duties even though other employees may be on strike or picketing. Any individual, or group, violating the above will be disciplined by the Union and are subject to discharge by the Employer. The Employer agrees there shall be no lock-outs.

ARTICLE VIII

COOPERATION

The Union and its members recognize that it is the responsibility of the Plant Protection employees to familiarize themselves with the plant rules established by the Employer and to faithfully report all violations thereof. The Union and its members further agree that the Plant Protection employees shall discharge their assigned duties impartially and without regard to any Union or nonunion affiliation or activities of any employee or employees, and that failure to do so will constitute cause for disciplinary action.

146 Aluminum Company of America, Detroit, Michigan, and International Union UAW—Amalgamated Plant Protection Local Union No. 114 (CIO)

9. Plant Protection and Military Organization of Plant Guard Forces

It is realized by the parties hereto that the adequate and continuous protection of the Company's Plant, Premises and Products is of paramount importance, and each party agrees that there shall be no interference whatsoever in the maintenance of satisfactory Plant Protection so long as required by the Company, and Plant Protection Employees covered by this agreement shall continue to perform their duties irrespective of a strike of other unions or employees at the Company's Plant.

Where necessary to instruct Plant Protection Employees as to their duties in connection with suspected plant sabotage or thievery, and such instructions are deemed confidential by the Company or any Public Officer, such instructions and information shall not be disclosed by them to the Union, Union officers, or others. Any such necessary instructions shall be given directly to each individual guard by a direct representative of the Management. Any Plant Protection Employee violating this rule will be subject to discipline, up to and including dismissal.

For the duration of the war, should any difference arise between the Company and the Union as to the meaning or application of the provisions of this Agreement as to hours of work, rates of pay, or conditions of employment, or should any trouble or controversy of any kind arise in, or with respect to, the plant
147 as between the Company and the Union, there shall not, on account or by reason of such difference, controversy, or trouble, be any strike, suspension, or slow-up of work at the plant, either prior to or during efforts to settle such difference, controversy, or trouble, or after the settlement thereof, but all such differences, controversies, or troubles shall be settled with the utmost dispatch, and only in the manner set forth under Grievance Procedure.[1]

Columbia Steel Company, Torrance Works, California and United Steel Workers of America

Section 2. Recognition.

* * * * *

The Union recognizes that it is the responsibility of the Plant Protection employees to familiarize themselves with the shop rules

[1] The above selection from a contract claims particular attention since it was executed by the local union involved in the Federal Motor case.

established by the Company and to faithfully report all violations thereof. The Union agrees that the Plant Protection employees shall discharge their duties, as assigned to them, impartially and without regard to any union or nonunion affiliation of any employee of the Company, and that failure to do so constitutes sufficient cause for discipline up to and including dismissal, and for reporting such cases to the proper representatives of the War Department.

The Union recognizes that it is the responsibility of the Plant Protection employees to guard and protect the employees and their property while on plant property; the plants, premises, material, facilities, and property of the Company at all times and to enforce the Company's rules under all circumstances. The Union agrees that its members shall faithfully dis-
148 charge this responsibility, and during the life of this Agreement that it will not cause or permit its members to cause, nor will any member of the Union take part in any strike, sit-down, stay-in, stoppage of work, or other interference with or refusal to perform their duty regularly assigned to them. The Union further agrees, in the event of any controversy between the Company and any other group or organization of its employees, resulting or threatening to result in any strike, stoppage of work, or other interference with production, that its members will continue to report for duty, remain at their posts, and in the regular manner, discharge the duties assigned to them. The Company reserves the right to discipline, including discharge, in accordance with Section 9, any employees who violate any provision of this section.

American Smelting & Refining Company—Federated Metals Division—Newark Plant and International Union of Mine, Mill and Smelter Workers (CIO)

ARTICLE III

POLICY OF THIS AGREEMENT

* * * * *

SECTION 3. The Union recognizes and agrees that the Employees covered by this agreement have a special, confidential, and direct responsibility to the Company requiring—

(a) That such Employees completely and diligently devote themselves to the interest of the Company.

(b) That such Employees familiarize themselves with and comply with all police, property-protection, and safety rules, regulations, and orders relating to the Plant and all directions and instructions of the Management of the Company relating to the Plant.

(c) That such Employees enforce said rules, regulations, orders, directions, and instructions and faithfully report to the Management of the Company all infringements or violations thereof and all other information as to activities detrimental to the Company, its plants, or its employees.

(d) That such Employees keep confidential and do not divulge to any person other than the Management of the Company all information obtained from any source having any bearing upon the Plant, its operations, or personnel.

(e) That such Employees fulfill and discharge their duties diligently, conscientiously, and impartially and without any regard to any Union or nonunion affiliation of any employee or employees of the Company or any other person or persons, and shall not engage in union activity on Company time.

(f) That such Employees conduct themselves at all times, both on and off duty, in accordance with the confidence and trust reposed in them.

(g) That such Employees at no time engage in any strike, mass-quit, work-stoppage, slow-down, sit-down, picketing, or any other conduct which may, in any way, interrupt or interfere with production at the Plant and that they will at all times fulfill and discharge their duties without regard to any strike, mass-quit, work-stoppage, slow-down, sit-down, picketing, or any other interruption of or interference with production at the Plant.

The Union agrees that failure on the part of any employee or employees to observe and fulfill such responsibilities shall be just cause for discipline by the Company up to and including summary dismissal, except that such action by the Company may be subject to consideration by the Grievance Committee.

SECTION 4. The Union agrees that it will not cause or permit its members to cause, nor will any member of the Union take part in, any strike, mass-quit, work stoppage, slow-down, sit-down, picketing, or any other interruption of, or interference with, production of the Plant, or otherwise violate the foregoing Section 2 hereof, and the Union further agrees that in the event of any strike, mass-quit, work stoppage, slow-down, sit-down, picketing, or any other interruption or interference with production of the Plant caused or engaged in by other employees of the Company, the Employees who are members of the Union will continue to report for duty, remain at their posts, and, in the regular manner, discharge the duties assigned to them. During the term of this Agreement, the Company shall not engage in any lock-out of Employees.

151

APPENDIX C

BOARD CASES INVOLVING PLANT PROTECTION EMPLOYEES WHICH APPROVE THE BARGAINING PATTERN INVOLVED HEREIN

Matter of American Forge Company	44 N. L. R. B. 826.
Matter of Chrysler Corporation	44 N. L. R. B. 881.
Matter of General Motors Corp	44 N. L. R. B. 1061.
Matter of The Maytag Company	44 N. L. R. B. 1265.
Matter of McCormick Works	44 N. L. R. B. 1332.
Matter of Campbell Soup Company	45 N. L. R. B. 6.
Matter of Johns-Manville Products Company	45 N. L. R. B. 33.
Matter of The Sherwin-Williams Defense Corporation	45 N. L. R. B. 46.
Matter of Westinghouse Electric Mfg. Co.	45 N. L. R. B. 51.
Matter of Bethlehem Steel Company	45 N. L. R. B. 92.
Matter of Royal Typewriter Company, Inc.	45 N. L. R. B. 291.
Matter of The United States Cartridge Company	45 N. L. R. B. 350.
Matter of Otis Elevator Company	45 N. L. R. B. 419.
Matter of Curtiss-Wright Corporation	45 N. L. R. B. 592.
Matter of Westinghouse Electric & Mfg. Co.	45 N. L. R. B. 776.
Matter of Curtiss-Wright Corporation	45 N. L. R. B. 1288.
Matter of Todd-Bath Iron Shipbuilding Corp.	45 N. L. R. B. 1367.
Matter of Fruehauf Trailer Company	46 N. L. R. B. 389.
Matter of Chrysler Corporation	46 N. L. R. B. 441.
Matter of Bethlehem Steel Company	46 N. L. R. B. 794.
Matter of Combustion Engineering Company, Inc.	46 N. L. R. B. 937.
Matter of Western Cartridge Company	46 N. L. R. B. 948.
Matter of Julius Petersen	46 N. L. R. B. 1049.
Matter of Puget Sound Bridge and Dredging Company	46 N. L. R. B. 1071.
Matter of Cramp Shipbuilding Company	46 N. L. R. B. 1186.
Matter of Chrysler Corporation, Evansville Ordnance Plant	47 N. L. R. B. 240.
Matter of Youngstown Sheet and Tube Company (Indiana Harbor Plant)	47 N. L. R. B. 391.
Matter of Westclox Division, General Time Instruments Corp.	47 N. L. R. B. 418.
Matter of Pressed Steel Car Company, Inc.	47 N. L. R. B. 425.
Matter of Walworth Company, Inc.	47 N. L. R. B. 512.
Matter of W. Sherman Burns	47 N. L. R. B. 610.
Matter of Republic Aircraft Products Division	47 N. L. R. B. 892.
Matter of Packard Motor Car Company	47 N. L. R. B. 902.
Matter of Ford Motor Company	47 N. L. R. B. 929.
152 Matter of Ford Motor Company, Highland Park Plant	47 N. L. R. B. 946.
Matter of Lord Mfg. Company	47 N. L. R. B. 1032.
Matter of Rockbestos Products Corporation	47 N. L. R. B. 1312.
Matter of Bethlehem Steel Corporation and Bethlehem Steel Company	47 N. L. R. B. 1330.
Matter of J. A. Zurn Manufacturing Co., West 19th St. Div.	48 N. L. R. B. 109.
Matter of The New Britain Machine Company	48 N. L. R. B. 263.
Matter of International Harvester Company	48 N. L. R. B. 273.
Matter of Hurley Machine Division of Electric Household Utilities Corporation	48 N. L. R. B. 295.
Matter of Metalloy Corporation	48 N. L. R. B. 408.

Matter of Ford Motor Company, Willow Run Bomber Plant	48 N. L. R. B. 413.
Matter of Chrysler Corporation	48 N. L. R. B. 512.
Matter of Timm Aircraft Corporation	48 N. L. R. B. 522.
Matter of California Packing Corporation	48 N. L. R. B. 693.
Matter of General Electric Company	48 N. L. R. B. 1395.
Matter of Donner-Hanna Coke Corporation	49 N. L. R. B. 1.
Matter of Briggs Manufacturing Co.	49 N. L. R. B. 57.
Matter of Textileather Corporation	49 N. L. R. B. 199.
Matter of The Williams J. Burns International Detective Agency	49 N. L. R. B. 385.
Matter of Ford Motor Company	49 N. L. R. B. 492.
Matter of Chrysler Corporation	49 N. L. R. B. 794.
Matter of Miami Shipbuilding Corporation	49 N. L. R. B. 803.
Matter of Briggs Indiana Corporation	49 N. L. R. B. 920.
Matter of The Murray Corporation of America	49 N. L. R. B. 925.
Matter of Durez Plastics & Chemicals, Inc.	49 N. L. R. B. 1061.
Matter of Warner Gear Division	49 N. L. R. B. 1122.
Matter of E. I. Du Pont de Nemours and Company	49 N. L. R. B. 1125.
Matter of General Cable Corporation	49 N. L. R. B. 1212.
Matter of Graver Tank and Mfg. Corp.	49 N. L. R. B. 1217.
Matter of Rockland Light & Power Company	49 N. L. R. B. 1398.
Matter of Lennox Furnace Company	50 N. L. R. B. 80.
Matter of Intercontinental Aircraft Corporation	50 N. L. R. B. 99.
Matter of Bethlehem Steel Company	50 N. L. R. B. 172.
Matter of Burns International Detective Agency	50 N. L. R. B. 219.
Matter of Aluminum Company of America	50 N. L. R. B. 233.
Matter of United States Cartridge Company	50 N. L. R. B. 358.
Matter of Maryland Drydock Company	50 N. L. R. B. 363.
Matter of Chicago District Electric Generating Corp.	50 N. L. R. B. 376.
Matter of Aluminum Company of America	50 N. L. R. B. 380.
Matter of Allen B. Du Mont Laboratories, Inc.	50 N. L. R. B. 437.
Matter of Electric Boat Company	50 N. L. R. B. 438.
Matter of City National Bank and Trust Company of Chicago	50 N. L. R. B. 516.
153 Matter of Firestone Tire and Rubber Company of Calif.	50 N. L. R. B. 679.
Matter of Allied Chemical & Dye Corporation	50 N. L. R. B. 700.
Matter of Bethlehem Steel Company	50 N. L. R. B. 713.
Matter of Aluminum Corporation of America	50 N. L. R. B. 963.
Matter of Arvey Corporation	50 N. L. R. B. 999.
Matter of Continental Can Company	50 N. L. R. B. 1025.
Matter of Taylor Forge & Pipe Works	51 N. L. R. B. 48.
Matter of Wenatchee Alloys, Inc.	51 N. L. R. B. 229.
Matter of Consolidated Steel Corporation, Ltd.	51 N. L. R. B. 333.
Matter of Howard Aircraft Corporation	51 N. L. R. B. 386.

Matter of American Steel and Wire Company	51 N. L. R. B. 449
Matter of United States Rubber Company	51 N. L. R. B. 532
Matter of the Baldwin Company	51 N. L. R. B. 868
Matter of Youngstown Sheet and Tube Company	51 N. L. R. B. 1261
Matter of Bravo Corporation	52 N. L. R. B. 322
Matter of Armour and Company of Delaware	52 N. L. R. B. 330
Matter of Todd Shipyards Corporation	52 N. L. R. B. 356
Matter of General Cable Corporation	52 N. L. R. B. 393
Matter of Hudson Motor Car Company	52 N. L. R. B. 399
Matter of American Steel Foundries	52 N. L. R. B. 432
Matter of Caterpillar Tractor Co.	52 N. L. R. B. 437
Matter of The Standard Oil Company	52 N. L. R. B. 570
Matter of American Bantam Car Company	52 N. L. R. B. 574
Matter of United States Rubber Company	52 N. L. R. B. 587
Matter of Atmospheric Nitrogen Corporation	52 N. L. R. B. 618
Matter of Budd Wheel Company	52 N. L. R. B. 666
Matter of Indiana and Michigan Electric Company	52 N. L. R. B. 670
Matter of Foote Brothers Gear and Machine Corporation	52 N. L. R. B. 801
Matter of Jones & Laughlin Steel Corporation	52 N. L. R. B. 973
Matter of Anaconda Wire and Cable Company	52 N. L. R. B. 1028
Matter of Bundy Tubing Company	52 N. L. R. B. 1224
Matter of Diamond Magnesium Company	52 N. L. R. B. 1233
Matter of Bethlehem Steel Company	52 N. L. R. B. 1265
Matter of The Holtzer-Cabot Electric Co.	52 N. L. R. B. 1469
Matter of Carnegie-Illinois Steel Corporation	53 N. L. R. B. 65
Matter of Bohn Aluminum and Brass Corporation	53 N. L. R. B. 231
Matter of Fairchild Engine and Airplane Corporation	53 N. L. R. B. 286
Matter of Aluminum Company of America	53 N. L. R. B. 482
Matter of Nebraska Defense Corporation	53 N. L. R. B. 716
Matter of Kellet Aircraft Corporation	53 N. L. R. B. 1038
Matter of Andover Motors Corporation	53 N. L. R. B. 1041
Matter of United States Rubber Company	53 N. L. R. B. 1067
Matter of Pittsburgh Plate Glass Company	53 N. L. R. B. 1181
Matter of The Missouri Valley Bridge and Iron Company	53 N. L. R. B. 1207
Matter of Ford Motor Company	54 N. L. R. B. 82
154 Matter of Embry-Riddle Company	54 N. L. R. B. 364
Matter of Glenn L. Martin-Nebraska Company	54 N. L. R. B. 424
Matter of Funsteel Metallurgical Corporation	54 N. L. R. B. 438
Matter of Goodyear Aircraft Corporation	54 N. L. R. B. 844
Matter of Extruded Metals Defense Corporation	54 N. L. R. B. 889
Matter of Farrel Birmingham Company, Inc.	54 N. L. R. B. 943
Matter of United States Aluminum Company	54 N. L. R. B. 1067
Matter of Bell Aircraft Corporation	54 N. L. R. B. 1093

Matter of Allis-Chalmers Manufacturing Company ..... 54 N. L. R. B. 1129.
Matter of American Smelting & Refining Company ..... 54 N. L. R. B. 1358.
Matter of Pacific Pump Works ..... 54 N. L. R. B. 1458.
Matter of William J. Burns International Detective Agency ..... 54 N. L. R. B. 1489.
Matter of American Finishing Company ..... 54 N. L. R. B. 1567.
Matter of Bell Aircraft Corporation ..... 54 N. L. R. B. 1578.
Matter of Sprague Specialities Company ..... 55 N. L. R. B. 47.
Matter of Miami Shipbuilding Corporation ..... 55 N. L. R. B. 123.
Matter of Phillips Petroleum Company ..... 55 N. L. R. B. 192.
Matter of Commonwealth Edison Company ..... 55 N. L. R. B. 465.
Matter of American Steel Foundries ..... 55 N. L. R. B. 960.
Matter of North American Aviation, Inc ..... 55 N. L. R. B. 1018.
Matter of Ryan Aeronautical Co ..... 55 N. L. R. B. 1171.
Matter of General Motors Corporation ..... 55 N. L. R. B. 1393.
Matter of The Murray Corporation of America ..... 55 N. L. R. B. 1434.
Matter of Great Lakes Corporation ..... 56 N. L. R. B. No. 49.
Matter of New Jersey Shipbuilding Corporation ..... 56 N. L. R. B. No. 63.
Matter of Berkey and Gay Furniture Co ..... 56 N. L. R. B. No. 111.
Matter of The Spang Chalfant Division of The National Supply Company ..... 56 N. L. R. B. No. 123.
Matter of The New York Quinine and Chemical Works, Inc ..... 56 N. L. R. B. No. 145.
Matter of Defoe Shipbuilding Company ..... 56 N. L. R. B. No. 149.
Matter of The National Supply Company ..... 56 N. L. R. B. No. 151.
Matter of Bankers Trust Company (Armed, non-military) ..... 56 N. L. R. B. No. 189.
Matter of Wilson and Company, Inc ..... 56 N. L. R. B. No. 220.
Matter of Bethlehem Steel Company ..... 56 N. L. R. B. No. 248.
Matter of Monsanto Chemical Company ..... 56 N. L. R. B. No. 254.
Matter of Airplane Mfg. and Supply Corporation ..... 56 N. L. R. B. No. 258.
Matter of Columbian Rope Company ..... 56 N. L. R. B. No. 282.
Matter of Standard Oil Company of N. J ..... 56 N. L. R. B. No. 289.
Matter of Swift and Company ..... 56 N. L. R. B. No. 307.
Matter of Ralston-Purina Company ..... 57 N. L. R. B. No. 13.
Matter of Bethlehem-Hingham Shipyards, Inc ..... 57 N. L. R. B. No. 37.
Matter of Standard Oil Co. of N. J ..... 57 N. L. R. B. No. 108.
Matter of Wyatt Metal and Boiler Works ..... 57 N. L. R. B. No. 118.
Matter of The Northern Coal and Dock Co. et al ..... 57 N. L. R. B. No. 122.
Matter of Duquesne Light Company ..... 57 N. L. R. B. No. 129.
Matter of Aluminum Co. of America ..... 57 N. L. R. B. No. 182.
Matter of Cincinnati Gas and Electric Company ..... 57 N. L. R. B. No. 199.
Matter of Union Stockyard and Transit Company ..... 57 N. L. R. B. No. 244.
Matter of National Foundry and Machine Company ..... 57 N. L. R. B. No. 249.
Matter of Goodyear Aircraft Corporation ..... 57 N. L. R. B. No. 286.

Matter of Southport Petroleum Company of Delaware	58 N. L. R. B. No. 9.
Matter of Swift and Company	58 N. L. R. B. No. 22.
Matter of Cudahy Packing Company	58 N. L. R. B. No. 37.
Matter of Radio Corporation of America	58 N. L. R. B. No. 55.
Matter of Aluminum Company of America	58 N. L. R. B. No. 140.
Matter of Dade Drydock Corporation	58 N. L. R. B. No. 165.
Matter of Crucible Steel Company of America	58 N. L. R. B. No. 195.
Matter of Pacific Tube Company	58 N. L. R. B. No. 203.
Matter of National Carbide Corporation	58 N. L. R. B. No. 261.
Matter of Mallinckrodt Chemical Works	58 N. L. R. B. No. 282.
Matter of Plankington Packing Company	59 N. L. R. B. No. 12.
Matter of Gar Wood Industries, Inc.	59 N. L. R. B. No. 17.
Matter of Iowa Packing Company	58 N. L. R. B. No. 25.
Matter of The Firestone Tire and Rubber Company	59 N. L. R. B. No. 113.
Matter of Armour and Company	59 N. L. R. B. No. 456.
Matter of International Harvester Company	59 N. L. R. B. No. 168.
Matter of Miami Shipbuilding Corporation	59 N. L. R. B. No. 196.

155 In United States Circuit Court of Appeals

Order granting motion to file brief and denying petition for rehearing

Filed Feb. 6, 1945

The Motion of United Steelworkers of America filed January 8, 1945, for leave to intervene and file a brief is granted; the brief of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO) filed January 8, 1945, as amicus curiae, is allowed; and the petition to rehear filed by National Labor Relations Board January 8, 1945, is denied.

In United States Circuit Court of Appeals

Order amending opinion

Filed Feb. 10, 1945

It is ordered by the court that its opinion, filed in these causes on December 8, 1944, be and is hereby amended as follows: (1) by striking from the second sentence of the fourth full paragraph appearing on page 2 thereof the subsection designation "a" and by substituting therefor the numeral "2" so that the sentence as amended now reads, "Here the Board must give consideration to Sec. 2 (2) and (3)"; and (2) by striking from the first sentence of the third full paragraph on page 7 thereof, the

156

section designation "2" and substituting therefor the numeral "9," so that the sentence as amended now reads, "The Board, under Sec. 9 (b) had a positive duty to perform in the interest of the public."

Certified copy of order granting certiorari

Filed June 4, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

157 In United States Circuit Court of Appeals

Order restoring case to calendar

Filed October 5, 1945

Pursuant to mandate of the Supreme Court, filed July [illegible], 1945, it is ordered that this case be restored to the open calendar for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved and the effect thereof on the Board's orders.

158 In United States Circuit Court of Appeals

Motion of National Labor Relations Board for decree enforcing its order

Filed Feb. 4, 1946

Comes now the National Labor Relations Board by David A. Morse, its general counsel, and moves this Court to enter a decree enforcing the order of the Board issued against the Jones & Laughlin Steel Corporation on December 2, 1943, and in support of said motion alleges:

1. On May 3, 1943, the National Labor Relations Board determined that all patrolmen, watchmen, and firemen, including dump laborers employed by the Jones & Laughlin Steel Corporation, hereinafter called the Company, at its Otis Works, constitute a unit appropriate for collective bargaining and directed an election for the purpose of determining whether or not
159 these employees desired to be represented by United Steelworkers of America, affiliated with the Congress of Industrial Organizations, hereinafter called the Union, for the purposes of collective bargaining (49 N. L. R. B. 394).

2. On May 27, 1943, at the election conducted pursuant to the aforesaid direction, out of 56 eligible voters, 52 cast ballots, of which 37 were cast for the Union and 15 against the Union (R. 47).

3. On June 5, 1943, the Board certified the Union as the exclusive representative of the above-described employees for the purposes of collective bargaining (R. 47).

4. On December 2, 1943, the Board issued its decision finding that on May 28, 1943 the Union requested the Company to bargain collectively with it as the exclusive representative of the aforesaid employees but that the Company on June 23, 1943, declined to bargain stating that "it is our intention to use every legal means available to us to have plant guards classified with Supervisors in respect to collective bargaining," determining that this constituted a refusal to bargain within the meaning of Section 8 (5) of the Act, and ordering the Company to cease and desist from its unfair labor practices and bargain collectively with the Union (53 N. L. R. B. 1046).

5. On December 8, 1944, this Court refused to enforce the Board's order on the ground that since the employees in question were militarized, it would be against public policy to require the Company to bargain with the Union as their representative (146 F. 2d 718).

160 6. On June 4, 1945, the Supreme Court of the United States granted a writ of certiorari to review the aforesaid judgment of this Court, vacated the judgment, and remanded the case to this Court "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved and the effect thereof on the Board's order" (325 U. S. 838). The Company's petition to the Supreme Court for rehearing upon the petition for certiorari was denied October 8, 1945 (65 S. Ct. 13).

7. The parties hereto on January 17, 1946 entered into a stipulation stating that all the guards employed at the Company's Otis Works were demilitarized on May 29, 1944; that the Company now employs 46 men in its plant guard force at the Otis Works, i. e., one police captain, 6 lieutenants and 39 patrolmen, all of whom, with possibly a few exceptions, have been employed as members of the Company's force of plant guards since a time prior to August 5, 1942, which was the date upon which the plant guards were militarized; and that the qualifications, strength, functions and duties of the plant guard force have continued the same since prior to August 5, 1942, with the exception of the added obligations which existed during the period of militarization.

8. It thus appears that the obstacles which this Court believed warranted it in refusing to enforce the Board's order have now been removed.

161 Wherefore, the Board prays this Honorable Court that it enter a decree enforcing in whole the order entered by the Board against the Company on December 2, 1943, as prayed in the Board's petition for enforcement heretofore filed in this Court.

NATIONAL LABOR RELATIONS BOARD,
By DAVID A. MORSE, *General Counsel.*

162 In United States Circuit Court of Appeals

Stipulation, upon remand from the Supreme Court of the United States

Filed Feb. 4, 1946

And now, to wit, this 17th day of January 1946, it is stipulated by counsel that the following may be accepted by the Court as facts; in its consideration of this matter under the remand of this case under an Order entered in the Supreme Court of the United States on June 4, 1945; it being understood that by signing this stipulation neither party admits any such fact, for any other purpose, and that each party reserves the right to contend that any such fact is incompetent, or irrelevant to the issues now before the Court:

First. All of the members of the force of plant guards employed at the Otis Works of Jones & Laughlin Steel Corporation, in Cleveland, Ohio, were "militarized," i. e., sworn and enrolled as members of the Auxiliary Military Police of the Army of the United States on August 5, 1942. They were "de-
163 militarized," pursuant to changes in the plant security program, by a letter addressed to the Corporation by an officer of the Army Service Forces, which was dated May 29, 1944, and delivered shortly afterwards, and of which a true copy is attached hereto, marked "Exhibit A" and made part hereof. Fifty-one "Certificates of Meritorious Conduct"—one for each member of the guard force—were enclosed with said letter and were shortly distributed among the guards, since which time none of the guards has been a member of the Auxiliary Military Police.

Second. 1. The force of plant guards had been employed and organized at some time long before the "militarization" of August 5, 1942; and it has continued to exist ever since the "demilitarization" of May 29, 1944. It consists at present of forty-six men: i. e., one police captain, six lieutenants, and thirty-nine patrolmen, all of whom, with possibly a few exceptions, have been employed as members of the force since a time prior to August

5, 1942. When and as qualified men become available, this force will be increased to a normal strength of about sixty men.

2. The plant guard force is maintained as a separate branch or department of the Otis Works. Its officers have offices and its members have quarters or barracks in the Works which are entirely separate from those occupied by other employees. The training, discipline, work and activities of the guard force are directed wholly by the police captain and under him the lieutenants. The police captain reports and is responsible directly to the Corporation's Director of Plant Security, in Pittsburgh, and to the executive officer of the Corporation who has general charge of the Works.

3. Every member of the guard force is and was required to be an American citizen, physically sound and fit, possessed of
164 at least a high school education, and of the highest personal character and reputation. Men having past military or police experience are preferred, and with a very few exceptions all members of the guard force have had such experience.

4. The police captain is a Deputy Sheriff of Cuyahoga County, Ohio. All members of the plant guard force are commissioned, sworn and bonded as private policemen of the City of Cleveland, under Section 188 of the Cleveland Municipal Code, 1924, and as such are members of the municipal police force and have and exercise the legal powers of peace officers in their work as plant guards.

5. When on duty, all members of the guard force are required to wear police badges, and uniforms of a military style, and they are armed with police revolvers and clubs or batons, and, when the occasion requires, with other arms and police equipment.

6. The principal functions of the guard force include the following:

(a) To protect the real and personal property of the Corporation which is comprised by the Otis Works, and the property of employees and other in the Works, from any damage, injury, theft, or trespass, which might otherwise be caused by fire, storm or other casualty, or by any act of trespass, or sabotage, or other wrongful act.

(b) To maintain peace and good order at all times among all others employed in the Otis Works, by demanding and enforcing obedience to the safety and other rules of the Corporation, and to all applicable public laws and ordinances, and by preventing or arresting any violation thereof or any breach of the peace in or near the Works.

(c) To detect and if possible prevent any criminal act in or near the Works; to investigate and report, in confidence to their

165 superiors, all crimes, suspected crimes, irregularities and casualties occurring in the Works; and to assist in the criminal prosecution of any person who may lawfully be charged to have committed or attempted any such crime.

7. The Otis Works is in two separate parts; the "Riverside Plant" and the "Lakeside Plant." The Riverside Plant is a tract of about 335 acres, bounded by the Cuyahoga River, Jennings Road, and Clark Avenue, in an outlying industrial district of the City of Cleveland, on which are located more than one hundred structures and improvements of an aggregate value of millions of dollars. These include raw material yards, power houses, blast and open hearth furnaces, rolling and finishing mills, annealing and finishing furnaces, and all of the other machinery required in a fully integrated steel works. At present, and normally, about 3,500 individuals are employed in productive labor and maintenance work at this plant. The Lakeside Plant is a tract of about thirty-three acres of land, situate between Lakeside Avenue and the shore of Lake Erie in an industrial district in the City of Cleveland, on which are located a power house, five open hearth steel furnaces, a steel foundry, a steel plate rolling mill, and a variety of appurtenant structures and improvements. The Lakeside Plant which normally employs several hundred productive laborers, has recently been shut down, and now affords employment for only about fifty such laborers.

8. Because of the magnitude and other characteristics of the Otis Works, its police protection by the ordinary police of the City of Cleveland is not practical or feasible; and, as a result, for a great many years, the police protection of the Works and the enforcement of law, peace and good order therein has been delegated wholly to the plant guard force. For similar reasons,
166 the work of preventing and extinguishing fires has been in large part the responsibility of the guard force, rather than that of the municipal fire department.

9. During the calendar year 1945, the work of the plant guard force included the following:

63 employees apprehended under the influence of liquor.
3 employees apprehended sleeping.
7 arrests made: one, assault and battery; one, carrying concealed weapons; two, rape; two, house breaking and larceny (one of the latter was discharged); one incest (discharged); all of the others were convicted.
18 investigations made of stolen property from lockers, etc.
3 investigations made of stolen property from automobiles.
4 investigations made of automobiles being damaged in parking lots.

3 investigations made of fatal accidents.
3 investigations made of natural deaths of employees while at work.
10 investigations made of employees fighting in plants.
2 employees escorted from plant for threatening Foremen.
7 employees escorted from plant for refusing to work.
11 employees apprehended for gambling while at work.
2 open hearth explosions investigated—employees injured.
2 departmental strikes.
19 fires attended.

Third. The qualifications, strength, functions and duties of the plant guard force during the period of their "militarization" were not materially different from those described in article Second of this stipulation, or from those which existed before
167 August 5, 1942, except that, during such period of "militarization," the plant guards were subject, in addition to their obligations as police, to the obligation of a military oath and to the applicable obligations of military law, that their drills were conformed to standards established by the Army, and that they were required to inform themselves of the contents of various communications published or circulated by authority of the Army.

(S) A. NORMAN SOMERS,
Assistant General Counsel,
National Labor Relations Board.

(S) JOHN C. BANE, JR.
REED, SMITH, SHAW & McCLAY,
Attorneys for Jones & Laughlin Steel Corporation.

168 *Exhibit A to stipulation*

ARMY SERVICE FORCES,
PRODUCTION SECURITY DISTRICT OFFICE,
CUYAHOGA BUILDING, 216 EAST SUPERIOR AVENUE,
Cleveland 1, Ohio, 29 May 1944.

JONES & LAUGHLIN STEEL CORPORATION,
3341 Jennings Road, Cleveland, Ohio.

Attention of Mr. V. H. Lawrence.

GENTLEMEN: Pursuant to recent changes in the plant security program, of which you are cognizant, you are hereby notified of the demilitarization of your Auxiliary Military Police guard force.

Inclosed you will find Certificates of Meritorious Conduct which are to be presented to the members of your present guard force upon return to you of the official identification cards which they now hold. These cards are the property of the War Department and it is requested that you in turn forward them to this office with the least possible delay.

Additionally, it is requested that you give one of the inclosed postal cards to each man. This will be filled out by the individual and returned to this office as soon as he is transferred to another department or his new place of employment is known.

This opportunity is taken to express the appreciation of this office for the excellent cooperation you have extended during the period your guard force was enlisted in the Auxiliary
169 Military Police. This change in policy in no way affects the importance of your facility to the War Effort, and it is assumed that you will accept the increased responsibilities which the curtailment of our program implies.

Very truly yours,

(S) G. J. Hales,
G. J. Hales,
Major, Ord. Dept., District Chief.

2 Incls:
Incl. 1—Honorable Discharges (51).
Incl. 2—Postal Cards (51).

170 In United States Circuit Court of Appeals

Cause argued and submitted

Filed Feb. 4, 1946

Before Hicks, Simons, and Allen, JJ.

This cause is argued by Ruth Weyland for Petitioner and by John C. Bane, Jr., for Respondent and is submitted to the court.

In United States Circuit Court of Appeals

Decree denying enforcement of Board's order

Filed April 4, 1946

On petition to enforce order of the National Labor Relations Board.

This cause came on to be heard on the transcript of record from the National Labor Relations Board, and the mandate of the Supreme Court of the United States, and was argued by counsel.

On consideration whereof, It is now ordered, adjudged, and decreed by this Court that the application to enforce the order of the National Labor Relations Board on review is denied.

171

No. 9730

United States Circuit Court of Appeals, Sixth Circuit

NATIONAL LABOR RELATIONS BOARD, petitioner

v.

JONES & LAUGHLIN STEEL CORPORATION, RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board

Opinion

April 4, 1946

Before HICKS, SIMONS, and ALLEN, Circuit Judges.

ALLEN, Circuit Judge. This is a second hearing of this case, which was instituted by the filing of a petition for enforcement by the National Labor Relations Board. The Board had found the respondent guilty of violating § 8 (1) and § 8 (5) of the National Labor Relations Act (29 U. S. C. §§ 151–166). The only unfair labor practice charged and found to exist was that the respondent had refused to bargain collectively with the United Steel Workers of America (C. I. O.), hereinafter called the Union, as representative of its plant guards. Respondent had theretofore bargained collectively with the Union and had signed a contract by which the Union and the respondent agreed in substance that the persons to whom the contract should apply should not include "foremen or assistant foremen * * *, watchmen, salaried employees and nurses." During the life of the contract the Union petitioned the Board for investigation and certification of representatives for the plant guards, that is, for watchmen. The Board held that the patrolmen, watchmen, firemen and dump laborers constituted an appropriate bargaining unit, and held an election in which the votes in favor of the C. I. O. predominated. The Union already represented all of the respondent's production and
172 maintenance employees, and the respondent upon request refused to negotiate with the Union as representative of its plant guards, claiming that they fall within the statutory definition of employer [29 U. S. C., Sec. 152 (2)], which includes "any person acting in the interest of an employer, directly or indirectly * * *" and therefore are not entitled to the rights of employees under 29 U. S. C., Sec. 157, including the right of self-organization and collective bargaining. The respondent also contended that the plant guards, since they were sworn in as mem-

bers of the military police and were under the control of the United States Army, could not be represented by any union. It therefore refused to bargain with the Union. The Board found that this refusal constituted an unfair labor practice, issued the usual order, and filed a petition for enforcement.

This court, in view of the conceded membership of these men in the military police, denied enforcement of the order. 146 Fed. (2d) 718. The court pointed out that when they were inducted into the unions and became subject to their rules and decisions, the plant guards assumed obligations to the unions and their fellow-workers which might well, in given circumstances, bring them in conflict with their obligation to their employers and their paramount duty as militarized police of the United States Government.

Subsequent to the judgment in this court the guards were demilitarized, and this fact was brought to the attention of the Supreme Court on certiorari proceedings filed on behalf of the Board. The case was remanded to this court "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof on the Board's order." An extensive stipulation filed upon remand from the Supreme Court also reveals that all the plant guards in question are members of the Cleveland police force.

The respondent contends that under § 10 (e) of the National Labor Relations Act [29 U. S. C., § 160, (e)], no fact not disclosed in the transcript can be regarded by the reviewing court, for the decision on review is required to be made and entered upon the pleadings, testimony and proceedings as set forth in the transcript, and that we therefore can neither consider the fact of demilitarization nor the public police functions exercised by the plant guards.

The Supreme Court, in National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co., 308 U. S. 241, 249,
173 250, held that the National Labor Relations Act "expressly deprives the reviewing court of power to consider" facts brought to its attention in a brief after hearing. "The case," the Supreme Court declared, "must be heard on the record as certified by the Board. The appropriate procedure to add facts to the record as certified is prescribed in § 10 (e) of the Act."

In any case, it is our duty to comply with the mandate of the Supreme Court. Here the fact of demilitarization was presented in a petition for certiorari, which perhaps differentiates the case from National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Co., supra. We therefore consider the controversy as if evidence on the question of demilitarization of the plant guards, and also on the facts embodied in the stipulation, had been presented at the hearing before the Board. So consid-

cred, we think our original conclusion was correct and adhere to it. The petition for enforcement must be denied.

As pointed out in our former opinion, the plant protection employees are employees when considered in their relationship to their employer; but when their relationship to their fellow-employees is examined together with the drastic police powers which they exercise over their fellows, they can hardly be considered in the same category. In their first relationship they are entitled to bargain collectively. The precise question here is not whether the plant guards should be permitted to organize, but whether the peculiar classification into which they fall makes it improper for the Board to permit their organization by the same union which represents the production employees. As revealed by the stipulation, the plant guards, even though their military service has ceased, perform a service which in its public aspect is closely analogous to that of the military police. Under the statutes of Ohio, of which we take judicial notice, the plant guards are peace officers (§ 13432-1, General Code of Ohio), charged on behalf of the public with preventing injury to property, breaches of the peace and criminal offenses, including misdemeanors and felonies. These particular plant guards are also commissioned policemen, the police captain being a deputy sheriff of Cuyahoga County, Ohio, and the other members of the force commissioned, sworn and bonded as private policemen of the City of Cleveland, under § 188 of the Cleveland Municipal Code, 1924. Counsel for the Board admits that the plant guards are part of the municipal police force and have and exercise the legal powers of police officers. During the year 1945 they not only made ordinary investigations of
174 thefts, accidents, etc., on the respondent's premises, but they made arrests for major felonies.

With the exception of the police captain, who is a state officer, the plant guards are municipal police. The municipality is an arm of the state, and the state is entitled to rely upon these guards to perform state police duties. In Ohio the policeman of a municipality is held to be a public officer. City of Cleveland v. Luttner, 92 Ohio St. 493, 494. The doctrine that the municipality is an agency of the state in matters affecting the public health and safety is enforced in Ohio even as to charter cities, which under the State Constitution have all powers of local self-government. Niehaus v. State ex rel. Board of Education, 111 Ohio St. 47.

It is the usual rule that special policemen are public officers performing public duties. Thornton v. Missouri Pacific Rd. Co., 42 Mo. App. 58; Dempsey v. New York City & Hudson River Rd. Co., 146 N. Y. 290; McKain v. Baltimore & Ohio Rd. Co., 65 W. Va. 233; Neallus v. Hutchinson Amusement Co., 126 Me. 469. This is

also the law in Ohio. New York, Chicago & St. Louis Ry. Co. v. Fieback, 87 Ohio St. 254. The fact that the guards are compensated by a private employer does not detract from the public character of their employment. The cited case held that a railroad policeman, appointed upon the application of the railroad company and commissioned by the Governor, though his salary is paid by the company, is a public officer and derives his authority directly from the state. The opinion points out (page 264) that "Police officers, by whomever appointed or elected are generally regarded as public or state officers deriving their authority from the sovereignty, for the purpose of enforcing the observance of the law. * * *" In Pennsylvania Rd. Co. v. Deal, 116 Ohio St. 408, a per curiam opinion, the rule announced in Railroad Co. v. Fieback was approved and relied on. The principles there laid down in respect to the functions of police officers, which are controlling here, compel the holding that these plant guards are municipal officers. Their functions and obligations are of a dual character. They have a private obligation to their employer and an obligation to the community as sworn, bonded and commissioned police officers. In case of industrial unrest and strikes on the part of the production employees, the obligations of the plant guards to the municipality and state would be incompatible with their obligations to the Union which, since it represents production employees, authorizes and directs the strike.

175 As pointed out in our previous opinion, it is the duty of the Board to consider the public interest as a material factor in selecting appropriate units for collective bargaining. Marshall Field & Co. v. National Labor Relations Board, 135 Fed. (2d) 391, 393 (C. C. A. 7); National Labor Relations Board v. Delaware-New Jersey Ferry Co., 128 Fed. (2d) 130, 137 (C. C. A. 3). We adhere to our conclusion that in the order under consideration the Board failed to give adequate consideration to the public welfare. A contrary conclusion would open wide the door to disorderly and criminal acts because of the limitation which the Board's order places on the power of the Government to furnish adequate police protection.

The application to enforce the order on review is denied.

176 In United States Circuit Court of Appeals

Order extending time to file petition for rehearing

Filed Apr. 29, 1946

The application filed April 22, 1946, for an extension of time to file a petition to rehear, to and including May 8, 1946, is allowed.

177 In the United States Circuit Court of Appeals for the Sixth Circuit

No. 9730

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JONES & LAUGHLIN STEEL CORPORATION, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

Petition of the National Labor Relations Board for Rehearing

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

Comes now the National Labor Relations Board, petitioner herein, and respectfully petitions this Court for a rehearing in the above-entitled case. In support of this petition, the Board shows as follows:

On April 4, 1946, the Court, upon rehearing pursuant to remand of this case by the Supreme Court of the United States (325 U. S. 838), issued its decision in which it denied enforcement of the Board's order herein requiring respondent to bargain collectively with the Union[1] as representative of respondent's
178 plant guards whom the Board found to constitute an appropriate bargaining unit. The ground upon which the Court rested its decision is that, although the guards are no longer militarized, they are "peace officers" of the State of Ohio and "commissioned policemen" of the City of Cleveland and, therefore, it would be against the public interest "for the Board to permit their organization by the same union which represents the production employees" of respondent (slip opinion, pp. 3–5).

The Board believes that the Court's decision is erroneous for the reason that (1) Section 10 (c) of the National Labor Relations Act precludes the Court from considering as a ground for refusing to enforce the Board's order, either the fact that the guards are public policemen, or the fact that they are represented by the same union which represents respondent's production employees, because respondent has never urged these facts before the Board as grounds for objecting to the Board's bargaining order; (2) the Act does not empower the Board to pass upon the propriety of the particular labor organization which the employees in an appropriate unit freely select as their bargaining representative; and (3) even

[1] The United Steelworkers of America (CIO).

if the Board had such power there would be no reason in the instant case for refusing to permit respondent's plant guards, who constitute an appropriate bargaining unit, to bargain through the Union; the supposition, given weight by the Court, that the bargaining pattern prescribed by the Board's order would, in
179 the event of industrial unrest, interfere with the proper functioning of the guards as public police officers, does not constitute such a reason.

I

Section 10 (e) of the Act commands that "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the Court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The Supreme Court in strictly interpreting "this explicit direction of Congress" recently declared that, "By this provision, Congress has said in effect that in a proceeding for enforcement of the Board's order, the court is to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested," and that "justification" of a Board order, in the light of a particular objection, is not open for review by a court if no prior objection has been urged before the case gets into court and there is a total want of extraordinary circumstances to excuse 'the failure or neglect to urge such objection.'" (N. L. R. B. v. Cheney California Lumber Co., 66 S. Ct. 553, 554–555).

That the consideration upon which this Court now refuses to enforce the Board's order, namely the fact that respondent's guards are commissioned public policemen and are represented by the same union which represents respondent's production employees, was "contestable before the Board but was in fact not contested" is indisputable. The guards were commissioned police dur-
180 ing the entire period of their militarization (Stip. 4a, 7a)[2] but no evidence bearing on that fact was adduced either at the hearing in the representation proceeding or at the hearing in the unfair labor practice proceeding (R. 3–20, 57–70). Nor did respondent in its exceptions to the Trial Examiner's Intermediate Report (R. 97–98), or in any other manner, urge the fact as an objection to the proposed bargaining order (R. 91–92) or even mention it in any respect before the Board.[3]

[2] In its brief in the Supreme Court (p. 8) in opposition to the Board's petition for certiorari respondent stated that "All regular members of the guard force at the Otis works have, for years, been sworn, enrolled, and commissioned as special patrolmen on the police force of the City of Cleveland." And as this Court noted in its decision herein, plant guards in Ohio are automatically made public peace officers under the General Code of Ohio, Sec. 13432–1 (slip opinion, p. 3).

[3] Respondent not only failed to urge this objection before the Board but, upon rehearing of the case by this Court on remand by the Supreme Court, contended, as the Board does now, that Section 10 (e) of the Act precluded this Court from considering as an element in the case "the public police functions exercised by the plant guards" (slip opinion, p. 2, Resp. Br. on Remand, pp. 13–17).

We submit that since the public police status of the guards was known to respondent at the time this case was heard before the Trial Examiner, and since respondent made no exception on this ground to the recommendation of the Trial Examiner that the Board issue an order requiring respondent to bargain collectively with the Union as the exclusive representative of the guards, it is "not within the power of the court" (the Cheney case, supra) to consider the public police status of the guards as a basis for refusing enforcement of the Board's order. On the contrary this Court, under the doctrine of the Cheney case is required to "render judgment on consent" as to this issue as to which there is a "total want of extraordinary circumstances to excuse" respondent's "failure or neglect to urge" it as an objection before the Board. The Cheney case (supra). See also Marshall Field & Co. v. N. L. R. B., 318 U. S. 253; May Department Stores Co. v. N. L. R. B., 66 S. Ct. 203, 209; N. L. R. B. v. Parkers Prairie Cooperative Creamery Association (C. C. A. 8), decided April 8, 1946, 17 L. R. R. 1241, 1242; N. L. R. B. v. Kinner Motors, Inc., and N. L. R. B. v. Van DeKamp's Holland-Dutch Bakers (C. C. A. 9), decided March 26, 1946, 17 L. R. R. 1205; N. L. R. B. v. Winter-Weiss Co. (C. C. A. 10), decided April 13, 1946; N. L. R. B. v. Illinois Tool Works (C. C. A. 7), decided February 27, 1946, 17 L. R. R. 946, 948.[1]

181

Nor does the order of remand by the Supreme Court relieve this Court of the injunction of Section 10 (e) of the Act with respect to the public police status of the guards, as this Court suggested in its opinion (slip opinion, pp. 2–3). The public police status of the guards, as we have indicated (supra, pp. 3–4) antedated their demilitarization. It was in no sense one of the "alleged changed circumstances with respect to the demilitarization of the employees involved" to which this Court was directed to give "further consideration" upon remand (325 U. S. 838). It was, and is, a factor which no party has ever raised in this case, as bearing upon the propriety of the Board's order. In these circumstances the "limitation [in Section 10 (e) of the Act] which Congress has placed upon the power of courts to review orders of the Labor Board is decisive * * *" of this case (the Cheney case, 66 S. Ct. at 554).

182

[1] This limitation upon the power of courts reviewing Board orders, which the Supreme Court has recognized, is analogous to that applied in cases involving review of rulings of a referee or special master appointed by a Federal District Court. Where a party fails to except in the District Court to such rulings, the appellate court may not consider the objection. Burns v. Rosenstein, 135 U. S. 449, 455–456; Brockett v. Brockett, 44 U. S. 690, 691–692. And this is so even where an objection may have been "noted before the referee" at the hearing, but where no formal exception to the ruling was made to the District Court. Fruit Growers' Express Co. v. Plate Ice Co., 59 F. 2d 605, 610 (C. C. A. 4), cert. denied 287 U. S. 642.

Just as Section 10 (c) of the Act precludes the Court from considering the public police status of the guards as a factor bearing upon the question of the validity of the Board's order, it also precludes the consideration which the Court has given to the circumstance that the Union, which represents the guards, also represents respondent's production employees. This is so because, in the Court's view, the impropriety of permitting the Union to act as bargaining agent of both the guards and the production workers results solely from the fact that the guards are public police (slip opinion, pp. 3–5).

But even if the fact that the same union represents both the guards and the production workers be considered apart from the matter of the public police status of the guards, it is not properly an issue before the Court in this case because it was never raised before the Board as an objection to the collective bargaining
183 pattern recommended by the Trial Examiner and prescribed by the Board's order (R. 91, 99–100).

Evidence adduced at the hearing in the representation proceeding (R. 7–8, 16–17, 19) established the fact that the Union also represented a separate unit of respondent's production employees. But this circumstance was not even mentioned in respondent's exceptions to the Trial Examiner's Intermediate Report (R. 93–98), nor presented to the Board in any other manner as grounds for an "objection" to a Board order requiring respondent to bargain with the Union as representative of the guards.[5]

Following the hearing in the representation case respondent filed with the Board, in lieu of a brief, a statement made by an official of the Bethlehem Steel Corporation to the House Military Affairs Committee (R. 15–16, 72). This statement declared, in part, that foremen and plant guards occupied analogous positions insofar as their bargaining rights under the Act were concerned and that neither group should be permitted to join any union in the first place and, in any event, should not be permitted to join the same union which represented the employer's production employees. But clearly the mere submission of such a statement to the Board in the course of the proceeding in the representation case does not satisfy the requirement of Section 10 (c) of the Act that an "objection" must be "urged before the Board" before
184 it may be "considered by the court," particularly in view of respondent's failure to mention the issue in its exceptions to the Trial Examiner's Intermediate Report. Indeed respondent did nothing here to "apprise the Board that * * * * [respondent] intended to press the question now presented" (Marshall Field and

[5] The fact that testimony appears as to a matter which was not made an issue by the pleadings before the Board does not properly make the matter an issue in the case. N. L. R. B. v. Bradford Dyeing Asso., 310 U. S. 318, 340–342.

Company v. N. L. R. B., 318 U. S. 253, 255). And respondent's failure to raise the question, we submit, precludes the Court from considering it (supra, pp. 4–5).

The fact that the Board, in its decision in the representation proceeding (R. 73–74), observed that the Union also represented respondent's production employees does not overcome the effect of respondent's failure to raise the issue before the Board. By the time the unfair labor practice proceeding was before the Board this particular question had become completely submerged and respondent did nothing to bring it to the Board's attention as an issue in the case. As the case now stands, therefore, the Court's decision turns upon an issue which was never raised before the Board and upon which the Board has not had an opportunity to pass judgment upon a considered appraisal of specific contentions contrary to the result reached by the Board in its decision.

The purpose of the limitation in Section 10 (e) of the statute is to afford the Board "opportunity to consider on the merits questions to be urged upon review of its order" (the Marshall Field case, 318 U. S. at 256) and to assure that "all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board" (the Cheney
185 case, 66 S. Ct. at 555). But, as we have seen, if an issue has not been raised before the Board it is too late to raise it by the time the case reaches the Circuit Court of Appeals and, in our view, the Court would be obliged to ignore the issue as a factor in the case. However, if this Court in the instant case believes that the public police status of the guards has a serious bearing upon the validity of the Board's order, the proper procedure, we submit, would be to remand the case to the Board for consideration of that fact "in the first instance," together with the "allowable inferences" therefrom, and for a determination of the question whether this newly revealed fact affects the propriety of the bargaining pattern the Board has thus far sanctioned in this case.[6] For the reasons stated below (infra, pp. 13–16), however, we submit that the Board's order should be enforced without remand, since there appears to be no justification for the view that the bargaining pattern prescribed by the Board's order will interfere with the guards' performance of their duty as public police officers.

[6] Since the fact that the same union represents separate bargaining units of respondent's guards and production workers did not arise as one of the "changed circumstances with respect to the demilitarization" of the guards, the issue with respect to that fact was not placed before this Court by reason of the order of remand of the Supreme Court any more than was the question of the effect upon the Board's order of the public police status of the guards (supra, pp. 5–6).

II

Assuming, contrary to the conclusions discussed above, that this Court was warranted in giving consideration to the fact
186 that respondent's guards are commissioned public police and are represented by the same union which represents respondent's production employees, the ground upon which the Court refused enforcement of the Board's order has no valid basis in law.

Although the Court stated that "it is the duty of the Board to consider the public interest as a material factor *in selecting appropriate units* for collective bargaining" (slip opinion, p. 5 [italics supplied]) and concluded that the Board here had "failed to give adequate consideration to the public welfare" in issuing the instant order (ibid.), we understand the rationale of the Court's decision to be that while the Board's determination that the guards constituted an appropriate bargaining unit may have been proper (the "precise question here is not whether the plant guards should be permitted to organize," slip opinion, p. 3), the Board's bargaining order is defective because it requires respondent to bargain as to its guards, who are public police officers, with the same union which represents respondent's production employees, and that such a bargaining pattern would be against public policy because it would interfere with the proper functioning of the guards in their capacity as public policemen (slip opinion, pp. 4–5). In short, the Court apparently holds that the Board should not permit respondent's guards to bargain, under the Act, through the Union, which they have selected as their bargaining representative, because that union also represents respondent's production employees. But the Board is of the opinion
187 that it does not have the power, under the Act, to effect such limitation upon the statutory bargaining rights of employees.

Recently, in Matter of Jones & Laughlin Steel Corporation, 66 N. L. R. B., No. 51, decided March 7, 1946, 17 L. R. R. 971, 972–973, the Board announced its opinion that Congress did not empower it to restrict the freedom of choice of any unit of employees and that it would, in fact, be an abuse of the Board's administrative discretion to refuse to certify any representative freely chosen by employees in an appropriate bargaining unit. The Board held, as it had earlier held in Matter of Godchaux Sugars, Inc., 44 N. L. R. B. 874, 877, that this result was compelled by Section 1 of the Act which states the Congressional policy to encourage "the exercise by workers of full freedom of association, self-organiza-

tion, and designation of representatives *of their own choosing*," (italics supplied).[7]

The Board's view that the statute does not authorize it to impose limitations upon the range of choice of representatives open to employees is supported, if not required, by the decision of the Supreme Court in Hill v. Florida, 325 U. S. 538. There the Supreme Court held invalid, because it conflicted with the
188 National Labor Relations Act, a state statute which purported to restrict the field of those who could act as collective bargaining representatives of employees. In so holding the Supreme Court emphasized that the purpose of the National Labor Relations Act is "to encourage collective bargaining and to protect the 'full freedom' of workers in the selection of bargaining representatives of their own choice." The Court declared that "Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. 'Full freedom' to choose an agent means freedom to pass upon the agent's qualifications." (325 U. S. at 541.) Clearly then, "the function assigned to the Board is not the choice of the labor organization to represent a bargaining unit, for that is to be the free choice of the majority of the employees in some defined group of employees which the Board finds to constitute the appropriate unit" (Pittsburgh Plate Glass Co. v. N. L. R. B., 313 U. S. 146, 171–172, opinion of Chief Justice Stone, dissenting on other grounds).

This Court's decision in the instant case, therefore, directs the Board in future similar cases[8] to perform, in the name of the public welfare, a supervisory function over the choice of
189 representatives of bargaining units of plant guards, which function, the Board believes, the Act prohibits it from performing. The Board's view, we submit, represents a reasonable interpretation of the Act in accord with the holding of the Supreme Court in Hill v. Florida (supra).

III

Even assuming that the Board has the power to limit the choice of representatives made by an appropriate unit of employees, the Court's decision herein that the Board improperly

[7] The recent Jones & Laughlin case cited concerned the bargaining rights of supervisory employees, not of plant guards. The broad principle there adopted by the Board, however, applies to "employees" as such, regardless of the nature of their duties. Since the Board's decision in this recent Jones & Laughlin case had not been issued at the time the instant case was argued before this Court upon remand, the Board's counsel was unable to state the Board's position in this respect as definitely as it is set forth in the Board's decision in that case.

[8] The Board has decided and continues to be presented with large numbers of cases involving the bargaining rights of plant guards who are deputized or commissioned as public police officers. Eg. Matter of Bethlehem-Fairfield Shipyard, Inc., 61 N. L. R. B. 901, 905–906; Matter of Standard Steel Spring Co., 62 N. L. R. B. 660, 662; Matter of Frick Company, 63 N. L. R. B. 837, 840; Matter of Rockbestas Products Company, 47 N. L. R. B. 1312, 1313–1314.

recognized the plant guards' selection of the Union as their representative was not warranted. The Court has substituted for the judgment of the Board that the bargaining pattern here involved would effectuate the policies of the Act, its own contrary judgment that it would be detrimental to the public interest to permit plant guards who are commissioned public police officers, and who otherwise constitute an appropriate bargaining unit, to bargain collectively with respondent through a union which also represents a separate bargaining unit of respondent's production employees. In the Court's view, the bare facts herein compel the conclusion that in "case of industrial unrest and strikes on the part of the production employees, the obligations of the plant guards to the municipality and state would be incompatible with their obligations to the Union which, since it represents production employees, authorizes and directs the strike" (slip opinion, p. 4); accordingly, the Court concludes, the Board's order is against the public interest "because of the limitation which * * * [it]
190 places on the power of the Government to furnish adequate police protection" (id. p. 5).

But the Court's conclusion is based entirely upon supposition. There is nothing in this record or in the Board's experience which demonstrates or even suggests that the conflict of interests cited by the Court actually exists or that, if it does, it would result in interference with the proper functioning of the guards in their capacity as public police officers. On the contrary, the Board's conviction that there is "no necessary conflict between self-organization for collective bargaining and the faithful performance of duty" (Matter of Chrysler Corporation, [redacted] L. R. B. 881, 885–886) has been borne out by experience. Despite the wide application of the bargaining pattern sanctioned by the Board in the instant case, in cases involving militarized plant guards as well as cases involving guards who are commissioned as public police officers, the Board has received no indication from any source that the dangers to the public interest allegedly inherent in its policy have in fact materialized in any case.*

As the Board has observed in a similar case, "the limited police powers of the guards * * * serve only to implement
191 their monitorial authority, and do not alter their status as employees" of the company (Matter of Bethlehem-Fairfield Shipyards, Inc., 61 N. L. R. B. 901, 906). As such "employees" the guards are entitled to exercise the bargaining rights guaran-

* In more than 80 cases the Board has certified, as bargaining representatives of militarized plant guards, unions which also represented separate units of other employees of the same employer. (See Board's brief on remand, p. 13, n. 8.) The Board has applied the same policy in numerous cases involving plant guards who are commissioned as public police officers. Eg. Matter of Standard Steel Spring Co., 62 N. L. R. B. 660, 662–663; Matter of Frick Company, 63 N. L. R. B. 837, 838–841.

teed by the Act, as both the Board and the Court have declared (slip opinion, p. 3). It is difficult to see, however, on the basis of the record herein and of the Board's experience, how the guards' full exercise of their bargaining rights "would open wide the door to disorderly and criminal acts because of the limitation which the Board's order [in sustaining those rights] places on the power of the Government to furnish adequate police protection" (slip opinion, p. 5). There is nothing beyond pure speculation to suggest that enforcement of the Board's order would interfere with the guards' proper performance of their duties. And the Board's order in no sense limits the authority of either the "government" or the Company to discipline guards should they fail to perform their duties. Moreover, labor organizations themselves which represent plant protection employees recognize the obligation of such employees, by the very nature of their function, to perform their duty of protecting the employer's property by remaining on the job when other employees are called out on strike.[10]

Upon the fact situation described above, the Board's de-
192 termination that it will effectuate the policies of the Act to require respondent to bargain with the Union as the representative of its plant guards cannot be called unreasonable and without basis in fact and law. Certainly the speculation as to imminent danger to the public welfare, upon which the Court relied, does not constitute a proper basis for setting aside the judgment of the Board. N. L. R. B. v. Hearst Publications, Inc., 322 U. S. 111, 130–131, and cases there cited.

Wherefore, it is prayed that a rehearing in this case be granted, and that on such rehearing the order of the Board be enforced.

Respectfully submitted.

DAVID A. MORSE,
General Counsel,
A. NORMAN SOMERS,
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RUTH WEYAND,
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National Labor Relations Board.

APRIL 1946.

[10] We have set out in the appendix hereto (infra, pp. 18–21) typical clauses appearing in collective bargaining contracts made by unions as representatives of plant protection employees, which provide that such employees shall continue to perform their duties to the employer during strikes called by other employees.

193 CERTIFICATE OF COUNSEL

Comes now A. Norman Somers, Assistant General Counsel for the National Labor Relations Board, and certifies that he has read and knows the contents of the foregoing petition, and that said petition is filed in good faith, and not for purposes of delay.

A. NORMAN SOMERS,
Assistant General Counsel,
National Labor Relations Board.

WASHINGTON, D. C., *April 1946.*

194 APPENDIX

The following excerpts are from collective bargaining agreements which cover plant protection employees only and are on file in the Bureau of Labor Statistics, United States Department of Labor, Washington, D. C.

Agreement between American Car and Foundry Company, Detroit, Michigan, and United Automobile Workers, Local 114 (CIO), dated January 31, 1945:

"It is realized by the parties hereto that the adequate and continuous protection of the Company's plant, premises and products is of paramount importance and each party agrees that there shall be no interference whatsoever in the maintenance of satisfactory plant protection so long as required by the Company, and Plant Protection Employees covered by this agreement shall continue to perform their duties irrespective of a strike of other unions or employees at the Company's plant."

Agreement between General Motors Corporation, Pontiac, Michigan, and United Automobile Workers, Local 416 (CIO), dated May 21, 1945:

"The Union recognizes that it is the responsibility of the Plant Protection Employees to guard and protect the plants, premises and property of the Company at all times and under all circumstances. The Union agrees that its members shall faithfully discharge this responsibility and, during the life of this Agreement, that it will not cause, or permit its members to cause, nor will any member of the Union take part in any sit-down, stay-in, or
195 curtailment of work. The Union will not cause or permit its members to cause, nor will any member of the Union take part in any strike, stoppage of work, or other interference with, or refusal to perform the duties regularly assigned to them, or picket any of the Company's plants or premises until all the bargaining procedure, as outlined in this Agreement, has been exhausted. The Union further agrees, in the event of any controversy between the Company and any other group or organiza-

tion of its employees, resulting or threatening to result in any strike, stoppage of work, or other interference with production, that its members will discharge the duties assigned to them. The Company reserves the right to cancel this Agreement in the event of any violation of this section, and to discipline any employees who engage in such violation."

Agreement between Federal Mogul Corporation, Detroit, Michigan, and United Automobile Workers, Local 114 (CIO), dated February 2, 1944:

"It is realized by the parties hereto that the adequate and continuous protection of the Company's Plant, Premises and Products, is of paramount importance, and each party agrees that there shall be no interference whatsoever in the maintenance of satisfactory Plant Protection as long as required by the Company, and Plant Protection Employees covered by this agreement shall continue to perform their duties irrespective of a strike of other unions of employees at the Company's Plant."

Agreement between Major & Independent Motion Picture Studios, Los Angeles, California, and Building Service Employees, Local 197 (AFL), dated November 17, 1944:

"The Union agrees that it will not call nor engage in any strike or stoppage of work. The Union agrees that it will use its best efforts to compel its members to perform their services for the Producer, even though other persons or groups of persons may be on strike.

"The Producer agrees that it will not call or engage in any lockout against the Union."

Agreement between the Missouri Valley Bridge and Iron Company, Evansville, Indiana, and Federal Labor Union, Local 23509 (AFL), dated February 11, 1944:

"Workmen employed under the terms of this Agreement will be permitted to go through picket lines whenever and wherever they shall be established for the purpose of protecting life and property, but, in no case, shall men so working be permitted to do the work of any other craft or do any other work, other than that which is required for the performance of their normal duties or such other acts as may be immediately necessary to protect life or property. It is further understood and agreed that this Union will not prevent any member from exercising his full policy powers in preserving order and protecting property, provided, however, that employees covered by this Agreement shall never be used as strikebreakers."

The following excerpts are from collective bargaining agreements on file with the Bureau of Labor Statistics which cover watchmen and maintenance employees.

Agreement between American Hide and Leather Company, Lowell, Massachusetts, and Fur and Leather Workers, Local 270 (CIO), dated April 4, 1945:

"It is realized by the parties hereto that the adequate and continuous protection of the Company's Plant, Premises, and Products, is of paramount importance, and each party agrees
197 that there shall be no interference whatsoever in the maintenance of satisfactory Plant Protection as long as required by the Company, and Plant Protection Employees covered by this agreement shall continue to perform their duties irrespective of a strike of other unions of employees at the Company's Plants."

Agreement between Naumkeag Steam Cotton Co., Salem and Peabody, Massachusetts, and Textile Workers Union of America, Local 74 (CIO), dated December 10, 1940:

"Either party may propose to the other at any time general increases or decreases in wages by giving the other party written notice of any change or changes desired. The Company and the Union will meet as promptly as possible in an endeavor to reach an agreement; if no agreement is reached within two (2) weeks then either party may be free to take such action as it deems proper. Should application of this section lead to a work stoppage, the Union agrees that firemen and a sufficient number of crewmen to provide necessary fire and other necessary protection will remain on their jobs."

198 In United States Circuit Court of Appeals

Order denying petition for rehearing

Filed May 20, 1946

The petition for rehearing is denied.

199 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE 1946

Supreme Court of the United States

No. 418, October Term, 1946

Order allowing certiorari

Filed December 23, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1947

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 419

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E. C. ATKINS AND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 30, 1946
CERTIORARI GRANTED SEPTEMBER 23, 1946

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 419

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

E. C. ATKINS AND COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX

	Original	Print
Proceedings in U. S. C. C. A., Seventh Circuit [omitted in printing]	1	
Certificate of National Labor Relations Board	2	1
Proceedings before National Labor Relations Board	5	3
Order designating trial examiner	5	3
Motion and order refiling of briefs	6	3
Request for oral argument, etc. (respondent's exhibit 102)	8	4
Decision and direction of election	9	4
Petition of E. C. Atkins and Co. for reconsideration and oral argument before the Full Board (Board's exhibit 106)	13	9
Order denying petition for reconsideration, etc	23	15
Report on ordered election	24	16
Certification of representatives	26	17
Order designating trial examiner	28	18
Order transferring case to N. L. R. B	29	19
Request for oral argument	30	19
Statement of exceptions of E. C. Atkins and Co. to intermediate report, record, and proceedings	31	20
Notice of hearing	46	29
Notice of postponement of hearing	47	29
Record of oral argument	48	30
Decision and order	49	30
Intermediate report of Trial Examiner	52	33

717768—46——1

	Original.	Print
Proceedings before National Labor Relations Board—Con.		
Reporter's transcript of hearing, Case No. 9-R-1200	63	43
Caption and appearances	63	43
Colloquy	65	43
Testimony of—		
Walter C. Gann	80	51
Frank M. Richardson	103	64
Henry A. Johnston	110	68
Cyrus E. Wood	142	84
Board's exhibits:		
1-A—Notice of hearing	161	94
First amended petition	162	95
1-B—Trial Examiner's statement in "R" cases	164	96
1-C—Affidavit as to service	165	98
2—Notice of postponement of hearing	166	99
3—Letter, Frank Richardson to E. C. Atkins, Aug. 18, 1943	168	100
4—Statement of Field Examiner concerning claims of authorization	169	100
Respondent's exhibits:		
1—Application for subpoena duces tecum	171	102
2—Agreement between United States of America and Plant Guard	174	103
3—Plant Guard identification card	175	104
4—Circular letter re Auxiliary Military Police	176	105
5—Application for employment	185	112
6—Certificate of enrollment	187	115
7—Certificate of meritorious conduct	188	116
8—Release from agreement as Civilian Auxiliary	189	117
9—The articles of war	190	117
10—Guard order No. 1	219	155
11—Guard order No. 2	220	156
12—Guard order No. 3	221	158
13—Except from Soldier's Handbook	222	159
14-16—Identification and pass cards	223	161
17—Collective bargaining agreement between E. C. Atkins and Co. and United Steelworkers of America, Local No. 1543	226	162
18-20—Agreement between E. C. Atkins and Co. and Sawsmith's Local Union No. 18548, and addenda thereto	243	171
21—Identification card	248	175
22-23—Forms filled out for F. B. I. and local police departments	249	176
Petitioner's exhibits:		
1—Constitution of Grand Lodge, District and Local Lodges—International Association of Machinists	253	178
2—Charter granted to Plant Protection, Lodge No. 1683	367	268

	Original	Print
Proceedings before National Labor Relations Board—Con.		
Reporter's transcript of hearing, Case No. 9–C–1982	369	269
Caption and appearances	369	269
Colloquy	372	269
Board's exhibits:		
101–A—Complaint	411	288
Notice of hearing	415	290
101–B—Affidavit as to service	416	291
101–C—Order granting motion for extension of time	417	292
101–D—Affidavit as to service	418	292
101–E—Answer of respondent	419	293
102—Proposed agreement between E. C. Atkins Company and International Association of Machinists, District No. 90 etc	427	297
103—Letter rejecting proposed agreement	439	304
104—Letter, Kurt Pantzer to E. C. Atkins and Co., Dec. 22, 1943	440	305
105—Brief of E. C. Atkins and Co	442	306
Respondent's exhibits:		
101—Application for subpoena duces tecum	467	319
Opinion, Major, J., May 31, 1946	471	320
Judgment, May 31, 1946	473	322
Clerk's certificate [omitted in printing]	474	322
Certificate of transmittal [omitted in printing]	475	322
Stipulated and addition to record	476	322
Charge, Case No. 9–C–1982 (Board's exhibit 101–A)	479	323
Transmittal of oral argument before Board on May 11, 1944	483	323
Petition for enforcement of an order of the Board	510	337
Motion to require petitioner to conform appendix and brief to rules of the Court	515	339
Memorandum in opposition to motion to require Board to supplement its appendix, etc	522	342
Reply to answer memorandum of petitioner	526	343
Order overruling motion to require petitioner to conform appendix and brief to the rules of the Court	533	347
Opinion, Major, J., Feb. 27, 1945	534	348
Order denying petition for enforcement, Feb. 27, 1945	558	366
Clerk's certificate [omitted in printing]	559	366
Order allowing certiorari		367

2 In the United States Circuit Court of Appeals for the Seventh Circuit.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E. C. ATKINS AND COMPANY, RESPONDENT

Certificate of the National Labor Relations Board

The National Labor Relations Board, by its Chief of the Order Section, duly authorized by Section 1 of Article VI, Rules and Regulations of the National Labor Relations Board, Series 3, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record in a proceeding had before said Board entitled, "In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90 and their affiliate, Local 1683," and, "In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90 and Their Affiliate Local 1683, affiliated with the American Federation of Labor," the same being Cases Nos. 9–R–1200 and 9–C–1982, respectively, before said Board, such transcript including the pleadings, testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto, are as follows:

Case No. 9–R–1200

(1) Copy of order, dated September 24, 1943, designating Thomas E. Shroyer as Trial Examiner for the National Labor Relations Board.

3 (2) Stenographic transcript of testimony held before Thomas E. Shroyer, Trial Examiner for the National Labor Relations Board, on September 24, 1943, together with all exhibits introduced into evidence.

(3) Copy of respondent's letter, dated September 28, 1943, requesting extension of time for filing brief.

(4) Copy of telegram, dated September 30, 1943, granting all parties extension of time for filing briefs.

(5) Copy of respondent's letter, dated October 9, 1943, requesting oral argument before the National Labor Relations Board.

(6) Copy of Decision, Findings of Fact, Conclusions of Law, and Direction of Election issued by the National Labor Relations Board October 19, 1943.

(7) Copy of respondent's petition for reconsideration of Decision and Direction of Election, dated October 19, 1943, oral argument thereon before the full Board, and memorandum in support thereof, dated October 28, 1943.

(8) Copy of order, dated November 2, 1943, denying aforesaid petition.

(9) Copy of election report issued by the Regional Director November 18, 1943.

(10) Copy of Certification of Representatives issued by the National Labor Relations Board November 29, 1943, together with affidavit of service thereof.

Case No. 9–C–1982

(11) Copy of order, dated January 31, 1944, designating Charles E. Persons as Trial Examiner for the National Labor Relations Board.

(12) Stenographic transcript of testimony held before Charles E. Persons, Trial Examiner for the National Labor Relations Board, on January 31, 1944, together with all exhibits introduced in evidence.

(13) Copy of Trial Examiner Persons' Intermediate Report, dated February 19, 1944 (annexed to Item (20) hereof).

(14) Copy of order transfering case to the National Labor Relations Board, dated February 23, 1944.

(15) Copy of respondent's letter, dated February 28, 1944, requesting oral argument before the National Labor Relations Board.

(16) Copy of respondent's exceptions to the Intermediate Report, dated March 6, 1944.

(17) Copy of notice of hearing for the purpose of oral argument before the National Labor Relations Board, dated April 19, 1944.

(18) Copy of notice of postponement of hearing for the purpose of oral argument before the National Labor Relations Board, dated April 28, 1944.

(19) Copy of appearances at the oral argument before the National Labor Relations Board, held on May 11, 1944.

(20) Copy of Decision and Order issued by the National Labor Relations Board, May 30, 1944, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In testimony whereof the Chief of the Order Section of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the

National Labor Relations Board of the City of Washington, District of Columbia, this 24th day of August 1944.

[SEAL]

John E. Lawyer,
JOHN E. LAWYER,
Chief, Order Section,
National Labor Relations Board.

5 Before the National Labor Relations Board

Case No. 9–R–1200

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90 AND THEIR AFFILIATE, LOCAL 1683

Order designating trial examiner

It is hereby ordered that Thomas E. Shroyer act as Trial Examiner in the above case and perform all the duties and exercise all the powers granted to Trial Examiners under Article III, Section 5 of the Rules and Regulations—Series 2, as amended, of the National Labor Relations Board.

Dated, Washington, D. C., September 24, 1943.

[SEAL]

Frank Bloom,
FRANK BLOOM,
Chief Trial Examiner.

6 SEPTEMBER 28, 1943.

E. C. ATKINS & COMPANY
Re: Plant Guard Unit

Re: E. C. Atkins & Company—Cause No. 9–R–1200

MR. JOHN E. LAWYER,
Chief, Order Section,
National Labor Relations Board,
Washington, D. C.

DEAR MR. LAWYER: The above designated case was heard on Friday, September 24, 1943, before trial examiner Schroyer at Indianapolis, Indiana. We desire to file a brief on behalf of the employer, and, under the rules of the board, this brief will be due on Friday, October 1, 1943. The report of the proceedings by the official reporter did not arrive in our office until this morning, Tuesday, September 28, 1943. The record consists of 98 typewritten pages and we believe we will be unable to examine it and prepare a printed brief within the regular time.

We therefore respectfully request a short extension of time for filing our brief, preferably until Friday, October 8, 1943.

Very truly yours,

BARNES, HICKAM, PANTZER & BOYD.
By (S) LEWIS D. SPENCER.

LDS:BB.

National Labor Relations

NLRB

JEL:JE

SEPTEMBER 30, 1943.

BARNES, HICKAM, PANTZER & BOYD,
1313 Merchants Bank Bldg., Indianapolis, Indiana.
F. M. RICHARDSON,
International Association of Machinists,
49½ South Delaware St., Indianapolis, Ind.

Re: E. C. Atkins 9-R-1200

All parties hereby granted to October 8 for filing briefs.

NATIONAL LABOR RELATIONS BOARD.

8 *Respondent's Exhibit 102*

PERMANENT FILE COPY

BARNES, HICKAM, PANTZER & BOYD

OCTOBER 9, 1943.

Case No. 9-R-1200

E. C. ATKINS and COMPANY
and
INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90 AND ITS AFFILIATE, LOCAL 1683,

NATIONAL LABOR RELATIONS BOARD,
Shoreham Building, Washington, D. C.
Attention Mr. John Lawyer.

DEAR MR. LAWYER: I refer to the hearing in the above-entitled case on Friday, September 24, 1943, in Indianapolis, Indiana, at the conclusion of which Trial Examiner Shroyer advised all parties would be given seven days time (until October 1, 1943) in which to file briefs, if any; to the telegram from your Board confirming an extension of time in which to file such brief to October 8, 1943;

and to the subsequent telephone conversation between Mr. Spencer, of our office, and yourself, confirming an extension of time in which to *mail* the brief to midnight on October 9, 1943.

I accordingly enclose herewith four copies of the "Brief of E. C. Atkins and Company."

I also enclose a copy of my letter to Mr. F. M. Richardson, the representative of the IAM; and shall appreciate it if you will advise me whether any further proof of service of copies of the brief is necessary. I shall also appreciate it if you will acknowledge receipt of this letter with enclosures.

I shall also appreciate it if you will consider this letter as a request for oral argument. A careful reading of the Dravo case indicates that the principal question raised in the enclosed brief was not called to the attention of the Board in that case. The matter of the interpretation of the word "employee," as used in the National Labor Relations Act is of such importance that I believe oral argument should be heard upon this further point, which affects so many plants engaged in the war effort.

Yours very truly,

KURT F. PANTZER.

KFP/TB.
Encls.

9. Before The National Labor Relations Board

Case No. 9-R-1200

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90 AND THEIR AFFILIATE, LOCAL 1683

Mr. Kurt F. Pantzer and Mr. Lewis D. Spencer, of Indianapolis, Ind., for the Company.

Mr. F. M. Richardson and Mr. Walter B. Heisel, Jr., of Indianapolis, Ind., for the Union.

Mr. Joseph E. Gubbins, of counsel to the Board.

Decision and direction of election

STATEMENT OF THE CASE

Upon petition duly filed by International Association of Machinists, District 90 and their affiliate, Local 1683, herein called the Union, alleging that a question affecting commerce had arisen concerning the representation of employees of E. C. Atkins and Company, Indianapolis, Indiana, herein called the Company, the National Labor Relations Board provided for an appropriate

hearing upon due notice before Thomas E. Shroyer, Trial Examiner. Said hearing was held in Indianapolis, Indiana, on September 24, 1943. The Company and the Union appeared, participated, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The company made a motion to dismiss the petition on the ground that plant-protection employees are not employees within the meaning of the National Labor Relations Act. The Trial Examiner reserved ruling. For reasons appearing below, this motion is denied. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. All parties were afforded opportunity to file briefs with the Board. Subsequent to the hearing, the Company requested oral argument before the Board.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. THE BUSINESS OF THE COMPANY

E. C. Atkins and Company, an Indiana corporation, is engaged at Indianapolis, Indiana, in the manufacture and sale of saws, tools, and armor plate. The Company operates two plants, both of which are located in Indianapolis, Indiana, and both of which are involved in this proceeding. During the year 1942 the Company purchased raw materials valued in excess of $500,000, approximately 80 percent of which was shipped from points outside the State of Indiana. During the same period the Company sold finished products valued in excess of $1,000,000, approximately 80 percent of which was shipped to points outside the State of Indiana. The Company admits that it is engaged in commerce within the meaning of the Act.

II. THE ORGANIZATION INVOLVED

International Association of Machinists, District 90 and their affiliate, Local 1683, is a labor organization affiliated with the American Federation of Labor, admitting to membership employees of the Company.[1]

III. THE QUESTION CONCERNING REPRESENTATION

On August 18, 1943, the Union by letter requested recognition as the exclusive bargaining agent for the Company's plant-protection employees. The Company failed to answer the letter.

[1] International Association of Machinists has requested the Board to take judicial notice of its reaffiliation with the A. F. of L.

Subsequently, at a conference between the parties, the Company refused to recognize the Union claiming that the unit requested was inappropriate.

A statement prepared by a Field Examiner, introduced in evidence, indicates that the Union represents a substantial number of employees in the unit hereinafter found to be appropriate.[2]

We find that a question affecting commerce has arisen concerning the representation of employees of the Company within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

IV. THE APPROPRIATE UNIT

The Union contends that a unit consisting of all plant guards at the Company's two Indianapolis plants, excluding the chief and lieutenants constitute an appropriate unit. The Company agrees with the scope of the unit but contends that such a unit is not an appropriate one since plant guards, who are all auxiliaries of the military police, are not employees within the meaning of the Act. This contention has been advanced in other cases and has been found untenable.[3] More recently, in the Dravo Corporation[4] case, the Board fully discussed the question as to whether the militarization of guards alters the character of their employment, stating therein that the relationship of employer and employee still exists despite such militarization. No facts or arguments are presented here which would warrant departing from our prior decisions; accordingly, the Company's contention is rejected.

We find, that all plant guards at the Company's two Indianapolis plants, excluding the chief and lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

V. THE DETERMINATION OF REPRESENTATIVES

We shall direct that the question concerning representation which has arisen be resolved by an election by secret ballot among the employees in the appropriate unit who were employed

[2] The Field Examiner's statement shows that the Union submitted 51 authorization cards, all of which bear apparently genuine signatures, and 44 of which bear names of persons whose names are listed on the Company's pay roll of September 10, 1943; there are 63 persons within the appropriate unit.

[3] Matter of Chrysler Corporation, Highland Park Plant, 44 N. L. R. B. 881; Matter of Phelps Dodge Copper Products Corp., 41 N. L. R. B. 973.

[4] Matter of Dravo Corporation, 52 N. L. R. B., No. 12.

during the pay-roll period immediately preceding the date of our Direction of Election, subject to the limitations and additions set forth therein.

DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended, it is hereby

Directed that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with E. C. Atkins and Company, Indianapolis, Indiana, an election by secret ballot shall be conducted as early as possible, but not later than thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Ninth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Sections 10 and 11, of said Rules and Regulations among the employees in the unit found appropriate in Section IV, above, who were employed during the pay-roll period immediately preceding the date of this Direction, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding any who have since quit or been discharged for cause, to determine whether or not they desire to be represented by International Association of Machinists, District 90, and their affiliate, Local 1683, for the purposes of collective bargaining.

Signed at Washington, D. C., this 19 day of October 1943.

[SEAL]

HARRY A. MILLIS,
Chairman,

JOHN M. HOUSTON,
Member,
National Labor Relations Board.

Board's exhibit 106

Before the National Labor Relations Board for the Ninth Region

Case No. 9–R–1200

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 96, AND THEIR AFFILIATE, LOCAL 1683

Petition of E. C. Atkins and Company for reconsideration of decision and direction of election dated October 19, 1943, and oral argument thereon before the full board

E. C. Atkins and Company, the employer involved in the above-entitled proceeding, respectfully shows the National Labor Relations Board that:

1. On October 19, 1943 the National Labor Relations Board, hereinafter referred to as the Board, entered its Decision and Direction of Election in this case.

2. One of the material issues therein is whether the relationship of employer and employee exists between the plant guards involved (hereinafter referred to as auxiliary military police) and E. C. Atkins and Company (hereinafter referred to as the Company) under the definition of "employer" in Section 2 (2) and "employee" in Section 2 (3) of the National Labor Relations Act.

3. The Decision and Direction of Election referred to above fails to discuss or consider in any manner the facts proved at the hearing with respect to the peculiar incidents and status of employment of the auxiliary military police, merely concluding that they are "plant guards, who are all auxiliaries of the military police" although the bulk of the 98-page official transcript and the 23 exhibits presented by the Company at the hearing deals with the peculiar incidents and status of employment of the auxiliary military police in great detail, differentiating therefrom "employees" as defined in the National Labor Relations Act.

4. The official transcript and the exhibits of the Company conclusively show that the auxiliary military police are hired by army officers, are supervised and controlled by army officers, and are discharged by army officers.

5. If the Board in its Decision and Direction of Election had found the facts incontrovertibly proved by the Company at the hearing, it would have been unable to conclude, as it did, "that the relationship of employer and employee still exists" or ever did exist between the auxiliary military police and the Company.

6. If the Board in its Decision and Direction of Election had found the facts incontrovertibly proved by the Company at the hearing, the inapplicability of the three prior decisions relied upon by the Board would be obvious.

7. The Board erred in concluding that the auxiliary military police were employees of the Company.

Wherefore, the Company prays that the Board reconsider its Decision and Direction of Election dated October 19, 1943, and grant the Motion to Dismiss the Petition for Certification made by the Company at the hearing. The Company respectfully requests permission to argue this petition before the full Board in Washington in support of said prayer.

KURT F. PANTZER.
Attorney for E. C. Atkins and Company.

14 MEMORANDUM IN SUPPORT OF PETITION

The 98-page official transcript and the 23 exhibits presented by the Company at the hearing were analyzed in the brief filed by the Company on October 11, 1943. The following summary indicates the facts proved at the hearing and ignored by the Board in its Decision and Direction of Election dated October 19, 1943.

Duties of Plant Guards.—The mission of a guard force of Auxiliary Military Police is to provide interior and exterior protection of the plant against sabotage, espionage and natural hazards and to serve with the Army in providing the protection to the plant and its environs in emergency situations (Exh. Company 4, Tr. 35). In this respect their general orders while on post are identical in wording and substance (Exh. Company 11) with those of a sentinel of the regular armed forces on guard duty as prescribed by the Basic Field Manual, Soldier's Handbook (Exh. Company 13). Specifically, their duties include directing traffic, escorting visitors, watching the gates and entrances, transporting cash within the plant, observing production workers, and other activities designed to prevent interruption of production (Tr. 21). They wear uniforms (Tr. 20), carry guns (Tr. 20), and salute army officers (Tr. 64). Their identification cards are issued by the War Department (Exh. Company 3, Tr. 27) and such cards differ materially from those issued to ordinary employees by the Company (Exh. Company 21, Tr. 94). The plant guards are given weekly instruction in the use of clubs and fists, pistol 15 marksmanship, military courtesy, methods of arrest, control and prevention of fires and similar topics by army officers (Tr. 30, 71).

Hiring of Plant Guards.—Army officers determine whether an applicant will be hired as a plant guard after they have made an independent investigation of his capacity, integrity, and patriotism (Exh. Company 4, Tr. 35, 51, 95). Each plant guard enters into a contract of employment with the United States of America (Exh. Company 2, Tr. 35) and receives a "Certificate of Enrollment" signed by Lieutenant Colonel Rasmussen of the United States Army (Exh. Company 6, Tr. 55).

Supervision and Control of Plant Guards.—Within each individual plant the Chief of the plant guards supervises their work and determines the shifts they work (Tr. 70), makes promotions (Tr. 67, 77) and has charge of discipline (Tr. 67). The Chief and his men are not subject to the orders of the Company's officers or other employees (Tr. 69, 73, 90, 91). The Chief in turn receives his instructions from the army officers (Tr. 59, 63, 79). All members of the guard force are subject to the Articles of War (Exh. Company 9, Tr. 60) and may be court-martialed or otherwise punished for violations thereof (Exh. Company 10, Tr. 62). Their work is controlled by the General Orders issued by army officers (Exhs. Company 10, 11, 12, Tr. 62).

Discharge of Plant Guards.—Dismissal of a plant guard requires the written approval of the army officer in charge (Exh. Company 10) and the Company does not have authority to discharge a plant guard permanently (Tr. 58). Upon termination of a plant guard's employment the army awards him a "Certificate of Meritorious Conduct" (Exh. Company 7, Tr. 57) unless he is discharged for misconduct, in which event only a formal release from his agreement with the United States Government is issued (Exh. Company 8, Tr. 58).

If the Board in its Decision and Direction of Election had included the facts established by the record and set forth above, it would have been unable to conclude, as it did, "that the relationship of employer and employee still exists" or ever did exist between the auxiliary military police and the Company. The interpretation of the National Labor Relations Act in this respect was recently considered by the Ninth Circuit Court of Appeals in Hearst Publications, Inc. et al. v. NLRB (June 10, 1943), 7 Labor Cases, par. 61, 659 (Cert. applied for, U. S. Supreme Court, Sept. 9, 1943, and granted Oct. 25, 1943). Judge Stephens held that the term "employee" should be given its ordinary and conventional meaning as developed under the common law and statutory enactments. The following language from the opinion is significant:

"Since the term 'employee' is not defined in the Act, we agree with petitioners' contention that it must be given its conventional meaning as developed under the common law and statutory enactments. Such a result is in accord with the basic theory of statu-

tory interpretation that the legislature is presumed to use words in their ordinary sense unless that sense is contradicted by the context of a statute. Old Colony R. Co. v. Commissioner, 284 U. S. 552, 560; Kepner v. United States, 195 U. S. 100, 124; Levy's Lessee v. M'Cartee, 10 U. S. 47, 49; Commissioner v. Plestcheef (C. C. A. 9), 100 Fed. (2d) 62, 64. Since the principle is a long established one, it would seem that if Congress had intended
17 to enlarge upon the common meaning of 'employee,' it would have specifically so stated in the Act, which sets out specific definitions to severel terms used in the Act.

* * * * * *

"The term 'employee' has been interpreted under several federal statutes, other than the National Labor Relations Act, in like manner based upon a broad policy of public benefit. In connection with the Federal Employers Liability Act (45 U. S. C. A. § 51) the Supreme Court stated:

"'We are of the opinion that Congress used the words "employee" and "employed" in the statute in their natural sense, and intended to describe the conventional relation of employer and employee.'"

Robinson v. Baltimore & Ohio Rr. Co., 237 U. S. 84, 94. In accord: Hull v. Philadelphia & Reading Ry. Co., 252 U. S. 475, 479. In connection with the Social Security Act (42 U. S. C. A. § 1004) this court asserted:

"However, in defining the required relationship, and in drawing the distinctions between an employee and an independent contractor, the regulations (defining an employee as one who is subject to the control of his employer with respect to what shall be done and as to how it shall be done) do no more than reiterate the familiar principles of the common law."

Anglim v. Empire Star Mines Co. (C. C. A. 9), 129 Fed. (2d) 914, 917. In accord: Jones v. Goodson (C. C. A. 10), 121 Fed. (2d) 176; Texas Co. v. Higgins (C. C. A. 2), 118 Fed. (2d)
18 636. A similar result was reached in connection with the Merchant Marine Act (46 U. S. C. A. § 688), Loe & Goldstein (C. C. A. 9), 101 Fed. (2d) 967, and with the Federal Safety Appliance Act (45 U. S. C. A. § 11), Stevenson v. Lake Terminal R. Co. (C. C. A. 6), 42 Fed. (2d) 357.

* * * * * *

"The question for decision as to each newspaper separate from any other paper is whether there is substantial evidence that the publisher exercises, or has the right to exercise, sufficient control over the activities of the newsboys defined in its appropriate unit to support the Board's decision that they were employees under § 2 (3) of the National Labor Relations Act."

Under the rule set forth in the Hearst Publications Case, the question for decision in this proceeding is whether there is substantial evidence in the record that the Company exercises, or has the right to exercise, sufficient control over the activities of the plant guards to support the Board's decision that they were employees under § 2 (3) of the National Labor Relations Act. The Decision and Direction of Election of the Board refers to no such evidence and in truth there is none. On the contrary the record affirmatively shows that the Company does not hire the plant guards, cannot control or supervise their work and does not discharge them.

The Board in its Decision and Direction of Election relied on its former decisions in Matter of Phelps Dodge Copper Products Corp., 41 N. L. R. B. 973 (June 15, 1942); Matter of Chrysler Corporation, Highland Park Plant, 44 N. L. R. B. 881 (October 7, 1942); and Matter of Dravo Corporation, 52 N. L. R. B. No. 12 (August 30, 1943). In the Phelps Dodge Case the company contended that the plant guards were a part of management, and therefore not employees within the meaning of the Act, a contention entirely different from the question presented in the present proceeding. The effect of the militarization of the plant guards on the employer-employee relationship was not discussed in the opinion. It is difficult to see, therefore, how this decision has any bearing on the present question of whether the Company has relinquished so much of its control over its plant guards to the Army that the relationship of employer and employee does not exist within the definition of those terms in the Act.

In the Chrysler Case the Board stated in its opinion:

"The employer's right to discharge for cause remains. Hiring, compensation for services performed, and general working conditions remain matters to be adjusted between the employer and employees through the usual employment contract."

In the present case the record clearly shows that the Company may not discharge a plant guard but may only relieve him of his duty temporarily (Tr. 57, 58). Also, hiring is not a matter to be adjusted between the employer and employees since the army officers determine whether an applicant will be hired (Tr. 51, 95). General working conditions are determined by the plant guard Chief (Tr. 67, 70, 77) who is responsible to an army officer (Tr. 59, 63), not to the Company (Tr. 69, 73, 90). The employment contract which the plant guards signs is with the United States of America (Exh. Company 2; Tr. 25). In all these respects the situation in the present proceeding is different from that in the

Chrysler Case, which accordingly has no application in the present proceeding.

In its Decision and Direction of Election the Board placed its principal reliance on the Dravo Case. In connection with the appropriate unit the union argued in that case that the fact the guards are sworn into reserve membership in the armed services was no reason for segregating them from other employes, whereas the company urged that this should prevent these employees from being represented by any union which represents any other category of personnel employed by the corporation. In deciding this sole issue the Board incidentally remarked that "the wages and duties of this group of personnel remained unchanged after their induction so that it is apparent that the proximate relationship of employer and employee still exists between the Company and the guards." The issue of whether the employee-employer relationship was present was thus not squarely presented or adequately considered. The finding of a "proximate relationship of employer and employee" is certainly not the interpretation of the Act contemplated by the Circuit Court of Appeals in the case of Hearst Publications, Inc., et al. v. N. L. R. B., supra. And as the Company pointed out in its original brief, it cannot reasonably be said in the present case that there has been no substantial change in the peculiar incidents and status of the relationship as result of supervision by the military authorities since the hiring, direction, supervision, and discharge of the plant guards is no longer within the control of the Company but is handled by the army officers.

21 In conclusion, it is the contention of the Company that whether an employer-employee relationship exists under the National Labor Relations Act depends upon the common law meaning of those terms. Hearst Publications, Inc., et al. v. N. L. R. B., supra. At common law the incidents of the employer-employee relationship were the hiring, control, and discharge of the employee by the employer. Hearst Publications, Inc., et al. v. N. L. R. B., supra; Bowman v. Pace Co., 119 F. (2d) 858 (C. C. A. 5, 1941); Williams v. United States, 126 F. (2d) 129 (C. C. A. 7, 1942); Texas Co. v. Higgins (C. C. A. 2, 1941); Mid-Continent Petroleum Corporation v. Vicars, 47 N. E. (2d) 972 (Indiana Supreme Court, 1943). These cases are fully discussed in the Company's original brief. In the present case the employer-employee relationship between the Company and the plant guards does not exist because the army officers hire the plant guards, control and supervise their work, and determine when they shall be discharged.

22 CONCLUSION.

The Board should reconsider its Decision and Direction of Election dated October 19, 1943, and should dismiss the Petition of the International Association of Machinists for Investigation and Certification of Representatives of auxiliary military police.

Respectfully submitted.

BARNES, HICKAM, PANTZER AND BOYD,
Attorneys for E. C. Atkins and Company,

KURT F. PANTZER,
LEWIS D. SPENCER,
Of Counsel.

Dated October 28, 1943.

23 Before the National Labor Relations Board

Case No. 9–R–1200

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90 AND THEIR AFFILIATE, LOCAL 1683

Order denying petition for reconsideration etc.

The Board having, on October 19, 1943, issued a Decision and Direction of Election in the above-entitled proceeding, and thereafter, on October 30, 1943, counsel for E. C. Atkins and Company having filed a Petition for reconsideration of the aforesaid Decision, for oral argument thereon, and Memorandum in support thereof, and the Board having duly considered the matter,

It is hereby ordered that the said Petition be, and it hereby is, denied.

Dated, Washington, D. C., November 2, 1943.

By direction of the Board:

[SEAL]

Milton A. Nixon,
MILTON A. NIXON,
Acting Chief, Order Section.

24 Before the National Labor Relations Board

9th Region

Case No. 9-R-1200

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90 AND THEIR AFFILIATE, LOCAL 1683.

Report on ordered election

Pursuant to the Rules and Regulations of the National Labor Relations Board (herein called the Board), the undersigned hereby reports that the election heretofore directed by the Board in the above-entitled case was conducted in accordance with the notice of election attached hereto and with the following results:

Approximate number of eligible voters	56
Count of ballots:	
Total ballots cast	55
Total ballots challenged	0
Total void ballots	0
Total blank ballots	0
Total valid votes counted	55
Votes cast for International Association of Machinists, District 90, and their Affiliate, Local 1683	50
Votes cast against International Association of Machinists, District 90, and their Affiliate, Local 1683	5

The counting and tabulating were fairly and accurately done. Statements to such effect from the observers to the election are on file.

25 The undersigned finds that International Association of Machinists, District 90 and their affiliate, Local 1683, has been designated and selected by a majority of the employees in the bargaining unit found by the Board in its Decision in this proceeding to be appropriate and recommends that the Board so certify.

Dated at Cincinnati, Ohio, this 18th day of November 1943.

[SEAL]

Rosemary S. Macke.
ROSEMARY S. MACKE,
Acting Regional Director,
National Labor Relations Board.

26 Before the National Labor Relations Board

Case No. 9–R–1200

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90 AND THEIR AFFILIATE, LOCAL 1683

Certification of representatives

On November 17, 1943, pursuant to the Decision and Direction of Election issued by the Board herein on October 19, 1943,[1] an election by secret ballot was conducted under the direction and supervision of the Acting Regional Director for the Ninth Region (Cincinnati, Ohio). Thereafter, on November 18, 1943, in accordance with the Rules and Regulations of the Board, a Report on Ordered Election was issued and served upon the parties. No objections to the said report, or to the conduct of the ballot, have been filed by any of the parties.

The report shows that of the approximately 56 eligible voters, 55 cast valid votes, of which 50 were for International Association of Machinists, District 90, and their Affiliate, Local 1683, and 5 against.

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Sections 9 and 10, of National Labor Relations Board Rules and Regulations—Series 3,

It is hereby certified that International Association of Machinists, District 90 and their affiliate, Local 1683 has been designated and selected by a majority of all plant guards at the two Indianapolis plants of E. C. Atkins and Company, Indianapolis, Indiana, excluding the chief and lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act, the said organization is the exclusive representative of all such employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Washington, D. C., this 29th day of November 1943.

[SEAL]

HARRY A. MILLIS,
Chairman.

JOHN M. HOUSTON,
Member.

National Labor Relations Board.

[1] 52 N. L. R. B., No. 249.

[Title omitted.]

27 *Affidavit as to service*

DISTRICT OF COLUMBIA, *ss:*

I, George A. Key, being first duly sworn, on oath saith that I am one of the employees of the National Labor Relations Board, in the office of said Board in Washington, D. C.; that on the 29th day of November 1943, I mailed postpaid, bearing Government frank, by registered mail, a copy of the Certification of Representatives to the following named persons, addressed to them at the following addresses: International Association of Machinists, District 90, and their affiliate Local 1683, Att: Messrs. F. M. Richardson & W. B. Heisel, Jr., 491½ South Delaware Street, Indianapolis, Indiana; E. C. Atkins and Company, 402 South Illinois Street, Indianapolis, Indiana; Messrs. Kurt F. Pantzer & Louis D. Spencer, 1313 Merchants Bank Building, Indianapolis, Indiana.

(S) GEORGE A. KEY.

Subscribed and sworn to before me this 29th day of November 1943.

[SEAL] KATHRYN B. HARRELL,
Notary Public, D. C.

My commission expires March 1, 1947.

28 Before the National Labor Relations Board

Case No. 9–C–1982

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90, AND THEIR AFFILIATE LOCAL 1683, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR

Order designating trial examiner

It is hereby ordered that Charles E. Persons act as Trial Examiner in the above case and perform all the duties and exercise all the powers granted to trial examiners under the Rules and Regulations—Series 3, of the National Labor Relations Board.

Dated, Washington, D. C., January 31, 1944.

[SEAL] Frank Bloom
FRANK BLOOM,
Chief Trial Examiner.

29 Before the National Labor Relations Board

Case No. 9-C-1982

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90, AND THEIR AFFILIATE LOCAL 1683, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR

Order transferring case to the National Labor Relations Board

A hearing in the above-entitled case having been held before a duly designated Trial Examiner and the Intermediate Report of the said Trial Examiner, a copy of which is annexed hereto, having been filed with the Board in Washington.

It is hereby ordered, *pursuant to Article II*, Section 32, of National Labor Relations Board Rules and Regulations—Series 3, that Case No. 9-C-1982 be, and it hereby is, transferred to and continued before the Board.

Dated, Washington, D. C., February 23, 1944.

By direction of the Board.

JOHN E. LAWYER,
JOHN E. LAWYER,
Chief, Order Section.

30

FEBRUARY 28, 1944.

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90

Case No. 9-C-1982

NATIONAL LABOR RELATIONS BOARD,
Washington, D. C.

GENTLEMEN: I am in receipt of the "Intermediate Report" of Trial Examiner Charles E. Persons, dated February 19, 1944, and filed in the above-entitled case, as well as the "Order Transferring Case to the National Labor Relations Board."

In accordance with the provisions of Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, I hereby request permission to argue orally before the Board upon its approval or disapproval of the Intermediate Report, and all other questions which may be raised in the case.

I desire you to note that this request is being made within ten days of February 23, 1944, and ask that you let me have acknowledgement of receipt of this request in writing.

Yours very truly,

(S) KURT F. PANTZER,
Attorney for E. C. Atkins & Company.

KFP:TB.

31 Before National Labor Relations Board
Washington, D. C.

Case No. 9–C–1982

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90, AND THEIR AFFILIATE LOCAL 1683, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR

Statement of exceptions to intermediate report, record, and proceedings

The Respondent, E. C. Atkins and Company, herewith files its statement in writing setting forth its Exceptions to the Intermediate Report and to other parts of the record and proceedings in this case (including rulings upon all motions or objections), and in support thereof alleges:

I

DEFINITIONS

National Labor Relations Board is hereinafter referred to as the "Board."

E. C. Atkins and Company, the Respondent herein, is hereinafter referred to as the "Respondent."

International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, the Complainant herein, is hereinafter referred to as the "Union."

32 Case No. 9–R–1200, entitled "In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and their affiliate, Local 1683, Petitioner," Notice of Hearing in which was dated September 16, 1943, and hearing in which was held September 24, 1943, is hereinafter referred to as the "Representation Case."

The Decision and Direction of Election, dated October 19, 1943, in the Representation Case, is hereinafter referred to as the "Decision in the Representation Case."

The "Certification of Representatives," dated November 29, 1943, in the Representation Case, is hereinafter referred to as the "Certification of Representatives."

Case No. 9–C–1982, entitled "In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and their Affiliate, Local 1683, affiliated with the American Federation of Labor," Notice of Hearing in which was dated January

12, 1944, and hearing in which was held January 31, 1944, is hereinafter referred to as the "Unfair Labor Practice Case."

The "Intermediate Report," dated February 19, 1944, in the Unfair Labor Practice Case, is hereinafter referred to as "Intermediate Report in the Unfair Labor Practice Case."

II

Exceptions to Findings of Fact

The Respondent excepts to the Findings of Fact for the reasons stated.

A. Exceptions to Decision in Representation Case

Exception No. 1.—There is no finding in Finding of Fact II, entitled "The organization involved" that either (a) the "employees" of the respondent referred to are the Plant Guards which were the subject matter of the representation proceeding, or (b) the "employees" admitted to membership in the Union were "employees" of the Respondent within the meaning of Section 2, clause 3, of the National Labor Relations Act.

Exception No. 2.—There is no finding in the entire Findings of Fact that the Plant Guards stationed at the two Indianapolis Plants of the Respondent were "employees" within the meaning of any provision of the National Labor Relations Act.

Exception No. 3.—There is no finding in the Findings of Fact that the Respondent was an "employer" of the Plant Guards stationed at the two Indianapolis Plants of the Respondent within the meaning of Section 2, clause 2, of the National Labor Relations Act.

Exception No. 4.—There is no finding which sets forth as existing between the Respondent and the Plant Guards stationed at the two Indianapolis Plants of the Respondent any of the incidents of "employer" and "employee," as such incidents existed at common law, other than the inferential finding that "in the Dravo Corporation case, the Board fully discussed the question as to whether the militarization of guards alters the character of their employment, stating therein that the relationship of employer and employee still exists despite such militarization"; and such incorporation by reference of facts which may or not have existed in the Dravo Corporation case does not constitute a finding of fact with respect to the instant case within the meaning of Section 9 or Section 10 of the National Labor Relations Act so as to form the basis for a valid decision or order, as the case may be, in a representation case or an unfair labor practices case before this Board.

34 **Exception No. 5.—The finding that the facts in the instant case inferentially resembled the facts in the Dravo Corporation case is not a finding of fact upon the record in this case so as to make any decision or order rendered upon such inference or conclusion a binding order within the meaning of due process, as used in the Fifth Amendment to the Constitution of the United States; and consequently the Findings of Fact, Conclusions of Law, and Decisions, Directions and Orders heretofore rendered by the Board in this case are void and of neither judicial nor administrative effect.**

Exception No. 6.—The Board failed to find any of the facts (uncontrovertibly established by the overwhelming weight of the testimony), existing in the instant case, which differentiate the instant case from the facts found in the Dravo Corporation case, to wit:

(a) The "Agreement Between the United States of America and _____ Plant Guard," executed between each Plant Guard and the United States upon assuming a position as Plant Guard at the two Indianapolis Plants of the Respondent (Employer's Ex. No. 2).

(b) The special "Plant Guard Identification Guard," executed by Plant Guards, issued by the Auxiliary Military Police for Plant Guards stationed at the two Indianapolis Plants of the Respondent (Employer's Ex. No. 3); as opposed to the identification cards issued by the Respondent to its employees stationed at the two Indianapolis Plants of the Respondent (Employer's Ex. No. 21).

(c) The oath of office taken by each Plant Guard as a civilian auxiliary to the Military Police (Employer's Ex. No. 2).

(d) The four orders issued by the Continuous Security District Office of the War Department at Cincinnati, Ohio, dated May 10, 1943, May 11, 1943, May 12, 1943, and June 7, 1943 (Employer's Ex. Nos. 10, 11, 12, and 4).

35 **(e) Plant Guards are subject to court martial and were, and have been, court martialled, as members of the Military Forces (Employer's Ex. Nos. 2 and 9).**

(f) General Orders of a Plant Guard, applying to all posts at the two Indianapolis Plants of the Respondent, are substantially similiar in all relevant respects to the general orders of sentinels, as prescribed by the Basic Field Manual of the Soldier's Handbook, issued by the War Department for troops in active service on July 23, 1941 (Employer's Ex. Nos. 11 and 13).

(g) Plant Guards are enrolled in the Auxiliary Military Police of the Army of the United States pursuant to a "Certificate of Enrollment," executed by a commissioned officer or officers of the United States Army (Employer's Ex. No. 6).

(h) Plant Guards who, upon discharge, have faithfully served as an auxiliary to the Military Police of the Army of the United States, are given a "Certificate of Meritorious Conduct," executed by a commissioned officer or officers of the United States Army (Employer's Ex. No. 7).

(i) Plant Guards who are discharged for cause are not entitled to a Certificate of Meritorious Conduct but are discharged informally by a commissioned officer of the United States Army (Employer's Ex. No. 8).

(j) The Respondent had no authority to hire any member of the Auxiliary Military Police but merely to recommend applicants for positions as Plant Guards, a commissioned officer in the United States Army, stationed in Cincinnati, Ohio, first investigating all such applicants and subsequently authorizing their permanent employment.

(k) The Respondent had no authority to discharge any member of the Auxiliary Military Police but merely to recommend discharge, a commissioned officer in the United States Army, stationed in Cincinnati, Ohio, having the sole right, after investigation, to effectuate a discharge.

(l) None of the incidents of the relationship between employer and employee at common law existed between the Respondent and the Plant Guards stationed at the two Indianapolis Plants of the Respondent with the sole exception of the incident that the Respondent paid the wages of such Plant Guards.

(m) The Respondent had absolutely no authority with respect to the duties of the Plant Guards stationed at the two Indianapolis Plants of the Respondent, or the way in which such duties were carried out.

(n) The Plant Guards stationed at the two Indianapolis Plants of the Respondent received their instructions and training at a special school conducted for the purpose by the United States Army.

And consequently such failure to find constitutes lack of due process in violation of the Fifth Amendment to the Constitution of the United States.

Exception No. 7.—There is no support for the finding that "at a conference between the parties, the Company refused to recognize the Union, claiming that the unit requested was not appropriate" (page 2) (See Transcript of September 24, 1942, pages 12, 17 and 87). As a matter of fact the reason which Respondent assigned for not recognizing the Union was that the Plant Guards were not "employees," and the Respondent was not an "Employer," within the meaning of those words as used in the National Labor Relations Act.

Exception No. 8.—The finding that "the Union represents a substantial number of 'employees' in the unit hereinafter found to be appropriate," is unsubstantiated by relevant testimony inasmuch as it is based upon the statement of a Field Examiner and evidence, which the Respondent never had an opportunity to examine or cross-examine, and such finding is consequently in violation of due process as prescribed by the Fifth Amendment to the Constitution of the United States.

Exception No. 9.—There is no evidence that "a question affecting commerce has arisen concerning the representation of 'employees' of the Company within the meaning of Section 9 (c) and Section 2 (7) of the National Labor Relations Act."

37 Exception No. 10.—There is no evidence to support the finding that "all plant guards at the Company's two Indianapolis Plants, * * * constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act."

Exception No. 11.—The Trial Examiner erred in denying the Respondent's "Application for Subpoena Duces Tecum Directed at F. M. Richardson to Produce Union Records" (Employer's Ex. No. 1) because such denial constituted a deprivation of due process under the Fifth Amendment to the Constitution of the United States.

Exception No. 12.—The Trial Examiner erred in admitting in evidence, over the objection of the Respondent, "Statement of Field Examiner Concerning Claims of Authorization for the Purpose of Representation," dated September 11, 1943 (Board's Ex. No. 4), inasmuch as the Respondent was not permitted to cross-examine the individual who made the statement and to examine the data on which it was based, thereby depriving the Respondent of due process as guaranteed by the Fifth Amendment to the Constitution of the United States.

B. EXCEPTIONS TO THE INTERMEDIATE REPORT IN THE UNFAIR LABOR PRACTICE CASE

Exception No. 13.—The finding that "Local 1683 admits to membership plant guards 'employed' by the respondent," is unsubstantiated by the evidence in the record or by any evidence found in the Findings of Fact.

Exception No. 14.—There is no finding that the Plant Guards were "employees" of the Respondent within the meaning of that word as used in the National Labor Relations Act.

Exception No. 15.—There is no finding that the Respond-
38 ent was an "employer" within the meaning of that word as used in the National Labor Relations Act.

Exception No. 16.—The statement that "no contention was advanced in the present proceeding attacking the Board's allegation that the Union is still the representative of the majority of the employees in the appropriate unit" is unsupported by the evidence because of the allegation of paragraph 4 of the "Answer of Respondent, E. C. Atkins and Company."

Exception No. 17.—The finding (lines 21 to 32 of the Intermediate Report in the Unfair Labor Practice Case) that "all the plant guards * * * constitute a unit appropriate for the purposes of collective bargaining" in accordance with the "Board's previous determination of the unit question," is void because it is based entirely upon its determination of the same question in the Representation Case. Inasmuch as the determination in the Representation Case was based upon facts supporting the finding and was in disregard of uncontrovertible facts established by the overwhelming weight of the testimony in the Representation Case which differentiate the Representation Case from the facts in the Draco Corporation case, such further finding in the Unfair Labor Practice Case is also unsupported by the evidence.

Exception No. 18.—The Intermediate Report in the Unfair Labor Practice Case has failed to reexamine the facts in the Representation Case or to examine such facts anew in the Unfair Labor Practice Case, all as set forth in the two briefs filed in the Representation Case and resubmitted as part of the record in the Unfair Labor Practice Case (Board's Ex. Nos. 105 and 106).

Exception No. 19.—There is no evidence that "a question affecting commerce has arisen concerning the representation of 'employees' of the Company within the meaning of Section 9 (c) and Section 2 (7) of the National Labor Relations Act."

Exception No. 20.—The Trial Examiner erred in denying the "Application for Subpoena Duces Tecum Directed at F. M. Richardson to Produce Union Records" (Respondent's Ex. 101) because such denial constituted a deprivation of due process under the Fifth Amendment to the Constitution of the United States.

Exception No. 21.—There is no evidence to sustain the finding that "the Respondent refused to bargain collectively with the Union as the exclusive representative of the 'employees' in the appropriate unit, and that the Respondent has thereby interfered with, restrained and coerced its 'employees' in the exercise of the rights guaranteed in Section 7 of the Act," because the Plant Guards are not "employees" of the Respondent.

Exception No. 22.—There is no evidence to support the finding that "the activities of the respondent * * * have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce."

III

EXCEPTIONS TO CONCLUSIONS OF LAW

The Respondent excepts to the following conclusions of law for the reasons stated:

A. EXCEPTIONS TO DECISION IN REPRESENTATION CASE

Exception No. 23.—The Board was in error in directing an election by secret ballot among the Plant Guards, inasmuch as such Plant Guards were not "employees" of the Respondent, and to the extent that such direction of election was intended to bind the Respondent as the "employer" of such Plant Guards.

Exception No. 24.—The direction of election is void because the facts found by the Board do not warrant such a direction of election as against the Respondent.

Exception No. 25.—The direction of election is not supported as a matter of law and is in violation of due process as prescribed by the Fifth Amendment to the Constitution of the United States.

B. EXCEPTION TO THE INTERMEDIATE REPORT IN THE UNFAIR LABOR PRACTICE CASE

Exception No. 26.—The conclusion that the Union is a "Labor organization within the meaning of Section 2 (5) of the Act" is unsupported by any evidence if the implication is to be drawn therefrom that such Union numbers among its membership any "employees" of the Respondent within the meaning of that word as used in the National Labor Relations Act as concluded in paragraph 1.

Exception No. 27.—There is no evidence to support the conclusion that "all plant guards * * * have constituted a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act," as concluded in paragraph 2.

Exception No. 28.—The Union has never been the "exclusive representative of all 'employees' in said unit," within the meaning of the word "employees" as used in the National Labor Relations Act, as concluded in paragraph 3.

Exception No. 29.—The Respondent at no time refused to bargain collectively with any exclusive representative of its "employees," as concluded in paragraph 4.

Exception No. 30.—The Respondent has never, with reference to the Plant Guards stationed at its two Indianapolis Plants, interfered with, restrained, and coerced "employees" in the exercise of the rights guaranteed in section 7 of the Act or engaged in any

unfair labor practices within the meaning of Section 8 (1) of the Act, as concluded in paragraph 5.

Exception No. 31.—The Respondent at no time was guilty of any unfair labor practices as concluded in paragraph 6.

IV

Exceptions to Recommendations in the Intermediate Report in the Unfair Labor Practice Case

Exception No. 32.—Recommendation 1 is not supported by the facts or the law because the Plant Guards at the two Indianapolis Plants of the Respondent are not "employees" of the Respondent as an "employer," within the meaning of those two words as used in the National Labor Relations Act.

Exception No. 33.—Recommendation 2 is not supported by the facts or the law because the Plant Guards at the two Indianapolis Plants of the Respondent are not "employees" of the Respondent as an "employer," within the meaning of those two words as used in the National Labor Relations Act.

42

V

General Exceptions

The Respondent further excepts to the Intermediate Report, Record, and Proceedings in this case, for the reasons stated:

Exception No. 34.—The relationship of employer and employee, with its various incidents, has never existed as between the Respondent and the Plant Guards in the instant case, and consequently the relationship between the Respondent and such Plant Guards is not subject to the jurisdiction of the National Labor Relation Board under any of the provisions of the National Labor Relations Act.

Exception No. 35.—The Union purports to represent Plant Guards at various other plants in the Indianapolis area, which Plant Guards have not been sworn into the Military Service under the articles of war; and the collective bargaining agreements executed between the Union and the corporations at which such Plant Guards are stationed, respectively, would, if produced by the Union, have been shown to contain provisions respecting seniority, discipline, handling of grievances, vacations, hours of work, and other incidents of tenure, which are incompatible with the articles of war and military orders pursuant to which the Auxiliary Military Police at the Plants of the Respondents are subject to the jurisdiction of the Continuous Security District Office of

the War Department of the United States of America, located in Cincinnati, Ohio; and consequently any order directing the Respondent to bargain with respect to such incidents of em-
43 ployment with the Plant Guards at the Plants of the Respondent is void and of no force and effect.

Exception No. 36.—The Decision in the Representation Case and the Intermediate Report in the Unfair Labor Practice Case are both void because the National Labor Relations Board denied the repeated written requests of the Respondent for permission to appear before the Board and make oral argument of the issues raised by the Respondent; the Respondent never having been permitted to address argument respecting Respondent's points to any member or representative of the Board, who prepared the Decision in the Representation Case, the Certification thereon entered November 29, 1943, or the Intermediate Report in the Unfair Labor Practice Case.

Wherefore, the Respondent prays that the Board accept the foregoing "Statement of Exceptions to Intermediate Report, Record, and Proceedings," filed for record on or prior to Thursday, March 9, 1944 (the latter date being fifteen days from the date of the entry of the order transferring the case to the Board), in order that the Respondent's exceptions taken herein may be taken and protected pursuant to the provisions of Article I, Section 33, of the Rules and Regulations, Series 3, of the National Labor Relations Board; that the record in the Representation Case be made a part of the record in the Unfair Labor Practice Case as contemplated by the provisions of Section 9 (d) of the National Labor Relations Act; that the Board accept the two briefs heretofore filed by the Respondent (Board's Ex. Nos. 105 and 106) as the briefs permitted by Section 33 of said Rules and Regu-
44 lations; and that the Respondent be permitted to argue its points orally before the Board upon the issues raised by such Statement of Exceptions and said Briefs.

Dated at Indianapolis, Indiana, March 6, 1944.

E. C. ATKINS AND COMPANY,
By BARNES, HICKAM, PANTZER & BOYD,
By KURT F. PANTZER,
Its Attorneys,
1313 Merchants Bank Building, Indianapolis, Indiana.

KURT F. PANTZER,
LEWIS D. SPENCER,
Of Counsel.

46 Before National Labor Relations Board

Washington, D. C.

Case No. 9–C–1982

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90 AND THEIR AFFILIATE, LOCAL 1683, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR

Notice of hearing

Please take notice that pursuant to authority vested in the National Labor Relations Board under an Act of Congress (49 Stat. 449) a hearing will be held before the National Labor Relations Board on Thursday, May 4, 1944, at 10:30 a. m., or as soon thereafter as the Board may hear you, in the Hearing Room at 815 Connecticut Avenue Northwest, Washington, D. C., for the purpose of oral argument in the above-entitled matter. Argument will be limited to one-half hour for each party, and you are hereby advised that in view of the Board's docket no request for additional time made at the hearing will be granted.

You may appear and be heard if you so desire.

Should the party requesting oral argument decide not to appear, such party must immediately notify the Board and all other parties. This is necessary in order to avoid serious inconvenience and expense to other parties.

Dated, Washington, D. C., April 19, 1944.

[SEAL]

John E. Lawyer,
JOHN E. LAWYER,
Chief, Order Section.

47 Before the National Labor Relations Board

Case No. 9–C–1982

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90 AND THEIR AFFILIATE, LOCAL 1683, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR

Notice of postponement of hearing

Please take notice that the hearing for the purpose of oral argument previously scheduled in this matter for Thursday, May 4, 1944, at 10:30 a. m., in the Hearing Room at 815 Connecticut Avenue Northwest, Washington, D. C., is hereby postponed to

Thursday, May 11, 1944, at 10:30 a. m., or as soon thereafter as the Board may hear you, at the same place.

Dated, Washington, D. C., April 28, 1944.

By direction of the Board:

[SEAL] John E. Lawyer,
JOHN E. LAWYER,
Chief, Order Section.

48 Before National Labor Relations Board

Date: 5/11/44
Time began: 10:30
Time ended: 11:25
Board Members present: 1. ———; 2. Reilly; 3. Houston.

Oral argument

Case No. 9–C–1982. Name: E. C. Atkins & Co.

Appearances: (A) *Of Counsel to the Board*—Review Attorney: M. E. Harris; (B) *For the Company*—Name: Kurt F. Pantzer, 1313 Merchants Bank Bldg., Indianapolis, Indiana; (C) *For the Union*—Name: L. O. Thomas, Machinists Bldg., Washington, D. C.

49 Before the National Labor Relations Board

Case No. 9–C–1982

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90, AND THEIR AFFILIATE LOCAL 1683, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR

Decision and order

On February 19, 1944, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices affecting commerce, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the respondent duly filed exceptions to the Intermediate Report and supporting briefs. Pursuant to notice, oral argument, in which the respondent and the Union participated, was held before the Board in Washington, D. C., on May 11, 1944.

The Board has considered the rulings of the Trial Examiner, and finds that no prejudicial error was committed. The rulings

are hereby affirmed. The Board has considered the Intermediate Report, the respondent's exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following addition:

The respondent contends that the guards involved in this proceeding are no longer the respondent's employees, but are employees of the United States of America by reason of having become civilian auxiliaries of the Military Police. We find this contention without merit. The United States of America does not claim that the guards are its employees. On the contrary, the agreement which each guard signs with the United States of America in order to obtain or retain employment with the respondent states in part as follows:

"* * * I, [name of guard], who have been or am about to be employed by [the respondent] as a guard at [the respondent's Indianapolis plants] for the purpose of guarding certain war material, war premises, and war utilities, in consideration of my employment or the continuation of my employment, do agree with the United States of America that * * * I am subject to military law during the period of my employment."

The record shows that the guards are interviewed for employment by the respondent and not by the United States of America, and are hired by the respondent; that their discharge is ordinarily initiated by the respondent; and that during their employment they are paid by the respondent, at rates set by the respondent and not by the United States of America. According to Chief Guard Henry A. Johnston, a witness called by the respondent in the hearing in the representation case, he is in command of all the guards at one of the plants and works "very closely" and "cooperates" with the respondent's representatives. Moreover, Johnston admitted that the respondent could temporarily suspend a guard from duty. Cyrus E. Wood, the respondent's personnel director, who corroborated Johnston's testimony as related above, referred to the guards at the plants involved as the respondent's employees, and further testified that the respondent makes the "necessary pay-roll deductions" before paying them their wages.

However, counsel for the respondent claimed at the oral argument before the Board that since the respondent could act for the most part only in an advisory and tentative manner, subject to the paramount approval or disapproval of the appropriate military authorities, the respondent retained virtually no control over the guards; and that there were virtually no subjects remaining on which it could bargain collectively with the guards' duly selected

representative. It is true that for reasons of national security the respondent may have surrendered to the military authorities many of the attributes of control which it would normally possess over its plant guards. It is clear, however, that the respondent still retains a sufficient residual measure of control over the terms and conditions of employment of the guards so that the guards should not be deprived of the rights guaranteed in the Act. Under the circumstances and upon the entire record, we find, as we did in the preceding representation case, that the guards are employees of the respondent.[1]

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, E. C. Atkins and Company, Indianapolis, Indiana, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, as the exclusive representative of all plant guards at its two Indianapolis plants, excluding the chief, lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, as the exclusive representative of all plant guards at its two Indianapolis plants,

[1] See Matter of Chrysler Corporation, Highland Park Plant, 44 N. L. R. B. 881, 883, where we stated in part as follows: "The War Department has recently * * * [made] plant protection employees at plants producing war materials civilian auxiliaries of the military police. Under appropriate Army supervision, they are being trained and equipped to meet the additional responsibility placed upon them. The Company contends that, even if their ordinary duties do not bar them from rights guaranteed under the Act, this military regulation changes their employment status and that they are no longer 'employees' within the meaning of the Act. We do not agree.

cluding the chief, lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment:

(b) Post immediately in conspicuous places throughout its two Indianapolis plants, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order, and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of this Order;

(c) Notify the Regional Director for the Ninth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 30 day of May 1944.

[SEAL]

GERARD D. REILLY,
Member.

JOHN M. HOUSTON,
Member.
National Labor Relations Board.

Before the National Labor Relations Board

Trial Examining Division, Washington, D. C.

Case No. 9–C–1982

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90, AND THEIR AFFILIATE LOCAL 1683, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR

Messrs. Thomas E. Shroyer and Allen Sinsheimer, Jr., for the Board.

Messrs. Kurt F. Pantzer, and Lewis D. Spencer, of Indianapolis, Indiana, for the respondent.

Messrs. F. M. Richardson, Carl Cedarquist, and William J. Layton, of Indianapolis, Indiana, and Mr. Van B. Carter, of Cincinnati, Ohio, for the Union.

Intermediate report

STATEMENT OF THE CASE

Upon a charge duly filed on December 23, 1943, by the International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, herein called the Union, the National Labor Relations Board, herein called the Board, by the Acting Regional Director for the Ninth Region (Cincinnati, Ohio), issued its complaint dated January 12, 1944, against E. C. Atkins and Company, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. A copy of the complaint, accompanied by notice of hearing, was duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance: (1) that all plant guards at the two Indianapolis plants of the respondent, excluding the chief and lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining; (2) that on November 29, 1943, the Board certified the Union as the exclusive representative of the employees of the respondent in such unit; (3) that on or about December 14, 1943, and at all times thereafter the respondent, although duly requested, refused to bargain collectively with the Union as the exclusive representative of all its employees in the said appropriate unit; and (4) that by such refusal the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

53 On January 27, 1944, the respondent filed its answer admitting certain allegations of the complaint concerning its business operations and the proceedings of the Board leading to the certification of the Union, but denying that its plant guards are employees within the meaning of the Act and also denying that it has committed any unfair labor practices. The paragraphs from the respondent's answer which set forth its affirmative contentions are here quoted in full:

"13. The Respondent further alleges that the Respondent is not, and cannot be, an employer within the meaning of Section 2 of the National Labor Relations Act, or any of its subdivisions, with respect to the "plant guards" referred to in the Complaint, because all of them were "auxiliary military police" under the jurisdic-

tion and control of the Continuous Security District Office of the War Department of the United States of America, located in Cincinnati, Ohio; and because all such "auxiliary military police" were in the Federal Military Service at all times alleged in the Complaint.

"14. The Respondent further alleges that the "employer" of the "plant guards," referred to in the Complaint, is the United States of America, and that consequently the Respondent cannot be their "employer" within the meaning of Section 2, subdivision 2 of the National Labor Relations Act.

"15. The Respondent further alleges that the relationship of employer and employee, with its various incidents, has never existed as between the Respondent and the plant guards referred to in the Complaint, and that consequently the relationship between the Respondent and such plant guards is not subject to the jurisdiction of the National Labor Relations Board under any of the provisions of the National Labor Relations Act."

In its decision[1] in the representation case upon which the Board's complaint relies for the establishment of the Union's position, as the statutory representative of the employees in an appropriate unit, the Board said:

The Company agrees with the scope of the unit but contends that such a unit is not an appropriate one since plant guards who are all auxiliaries of the military police, are not employees within the meaning of the Act. This contention has been advanced in other cases[2] and has been found untenable. * * * No facts or arguments are presented here which would warrant departing from our prior decisions; accordingly the Company's contention is rejected.

Two other contentions advanced by the respondent in its answer have also heretofore been disposed of by the Board. The respondent contends that the Board's Decision and Direction
54 of the Election and the Certification are void, "because the [Board] denied repeated written requests of the respondent for permission to appear before the Board and make argument of the issues raised by the respondent." The Board in its Decision denied such a request for oral argument and in disposing of the respondent's Petition for Reconsideration of the Decision again denied a request for oral argument.

[1] Matter of E. C. Atkins and Company and International Association of Machinists, District 90 and their affiliate Local 1683, 52 N. L. R. B. 1470. The entire record in this case was incorporated by reference in the instant proceeding. This fulfills the request of the respondent in paragraph 19 of its answer for "leave to incorporate all the objections and exceptions in such record by reference thereto, as defenses to the complaint."

[2] The Board cited: Matter of Chrysler Corporation, Highland Park Plant, 44 N. L. R. B. 881; Matter of Phelps Dodge Copper Products Corp., 41 N. L. R. B. 973; and Matter of Dravo Corporation, 52 N. L. R. B. 322.

Again the respondent contends in its answer that "the hearing was held without due process of law because of the denial, in part, of the Respondent's application for subpenas duces tecum * * * and that consequently said decision and direction of election is void and of no force and effect against the Respondent." The Board in its decision affirmed this ruling of the Trial Examiner. Hence this matter has been disposed of except for additional requests presented in the present proceedings calling for copies of collective bargaining agreements between the Union and employers in the Indianapolis area and for records of proceedings had thereunder. These requests were denied by the undersigned [3] as similar in content and purpose to requests the denial of which are affirmed by the Board.

Pursuant to notice, a hearing was held at Indianapolis, Indiana, on January 31, 1944, before Charles E. Persons, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel and the Union by certain of its officials. All parties participated in the hearing. Full opportunity to be heard, to examine, and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. At the close of the hearing all parties waived their right to participate in oral argument before the Trial Examiner and to present briefs for his consideration.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The Business of the Respondent [4]

E. C. Atkins and Company, the respondent, is an Indiana corporation, having its principal offices in Indianapolis where it operates two plant, engaged in the manufacture and sale of saws, tools, and armor plate.

The principal raw materials used in such manufacturing are steel, castings and lumber. During the calendar year 1943 the raw materials purchased cost in excess of $500,000. Approximately 80 percent [5] of such raw materials are purchased and shipped in interstate commerce from points outside the State of Indiana.

In the same period the gross sales of the respondent to the United States Government and to jobbers, dealers, subcontractors and direct to manufacturing consumers, were in excess of $1,000,000.

[3] Through error this ruling does not appear in the transcript of testimony. It is here repeated *nunc pro tunc*.

[4] These findings are based on a stipulation of the parties incorporated in the record and on allegations in the complaint admitted by the respondent in its answer.

[5] The transcript of testimony incorrectly reported this percentage as "eight." The undersigned hereby orders that the transcript on page 20 line 1 be corrected by substituting eighty for "eight."

Approximately 80 percent in value of such products were shipped by rail and truck to customers outside the State of Indiana.

55 During the calendar year 1944, to the date of this hearing, the manufacturing and selling operations of the respondent have continued substantially along the same lines as in 1943.

The respondent advertises through industrial magazines and periodicals.

The respondent concedes that it is engaged in commerce within the meaning of the Act.

II. THE ORGANIZATION INVOLVED

Plant Protection Lodge No. 1683 is a labor organization whose membership is confined to plant guards in the Indianapolis area. It is affiliated, through District No. 90, with the International Association of Machinists which, in turn, is affiliated with the American Federation of Labor. Local 1683 admits to its membership plant guards employed by the respondent.

III. THE UNFAIR LABOR PRACTICES

A. Background

The respondent's main plant in Indianapolis covers two entire city blocks and has been in operation since 1857. The Federal Government built and equipped the Fall Creek Ordnance Plant which is operated by the respondent under lease. Since 1937 the United Steel Workers of America, CIO and the respondent have maintained contractual relations covering in general all production workers in both plants but excluding certain craft groups and plant guards. This contract currently provides for a union shop and covers over 1200 employees. The sawsmiths are a highly skilled group. In the two plants about 60 are employed. They are closely organized in Sawsmiths Local Union No. 18,548 affiliated with the A. F. of L. and have had collective bargaining agreements with the respondent "for a number of years." [6] Their current contract provides for a closed shop.

Plant Protection Lodge No. 1683 was chartered by the International Association of Machinists on April 2, 1943. When a claim to represent a majority of the Plant Protection employees of the respondent, presented by letter dated August 18, 1943, was ignored, the Union on September 14, 1943, petitioned the Board for Investigation and Certification of Representatives. After hearing on September 24, 1943, the Board issued its Decision and Direction of Election on October 19, 1943. An election was duly

[6] *See Matter of E. C. Atkins and Company and United Steel Workers of America Local 15, CIO*, 47 N. L. R. B. 479.

held on November 17 in the appropriate unit defined by the Board in its decision. The Union received a majority of the votes cast. Accordingly the Board on November 29, 1943, "certified that International Association of Machinists, District 90 and their affiliate, Local 1683 has been designated * * * as the exclusive representative of all such employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment."

B. The refusal to bargain collectively with the Union

1. The appropriate unit and representation by the Union of a majority therein

The complaint alleges that all plant guards at the two Indianapolis plants of the respondent, excluding the chief and lieu-
56 tenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act. This is the appropriate unit found by the Board in its Decision and Direction of Election. The Company does not contest either the combining of the two plants in a single unit or the various inclusions and exclusions in the defined unit.

As noted above an election was held on November 17, 1943, under the Board's supervision. Of 65 valid votes counted, 50 were for and 5 against International Association of Machinists, District 90, and their affiliate Local 1683. No objections to the Regional Director's report on this election was filed by any party.[7] On November 29, 1943, the Board accordingly certified the Union as the statutory representative of the employees in the appropriate unit defined in its Decision. No contention was advanced in the present proceeding attacking the Board's allegation, that the Union is still the representative of the majority of the employees in the appropriate unit. The undersigned finds that the Union is the representative of a majority of the employees in the said unit.

The undersigned finds in accordance with the Board's previous determination of the unit question and its certification of the Union that all plant guards at the respondent's Indianapolis plants, excluding the chief and lieutenants and all other supervisory em-

[7] Paragraph 5 of the respondent's answer contains the statement: "the Respondent denies that such secret ballot election was properly conducted." When questioned at the hearing as to the connotation intended, respondent's counsel replied: "There is no connotation intended by that language that the election was conducted other than in a very fair and accurate way and that the ballots were cast as shown by the certificate, that the ballots were counted and that the results were as shown. In other words, on the matter of fairness of the election, there is no contention."

ployees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act. It is further found that the International Association of Machinists, District 90, and their affiliate, Local 1683 is and has been at all times since November 29, 1943, the statutory representative of the employees within the appropriate unit.

2. The refusal to bargain

At some time between December 1 and 20, 1943 the Union sent to the Company by mail a copy of a proposed agreement. Although the document was not accompanied by a covering letter the respondent agrees that its presentation was, in effect, a request for collective bargaining.[8]

Under date of December 20, 1943, the respondent through Cyrus E. Wood, its personnel director, wrote Richardson as business representative of the Union, acknowledging receipt of the proposed agreement, and calling attention to the respondent's contention that auxiliary military police were in no sense employees of the respondent. The final paragraph of this letter read: "Under the circumstances may we suggest that you take such other action as you see fit to establish our obligation to bargain with you respecting such auxiliary military police."

57 Answering paragraph 8 of the complaint which alleges that "on or about December 14, 1943, and at all times thereafter, the respondent refused, and has since continued to refuse, to bargain collectively with the Union as the exclusive representative of the employees in the unit described," the respondent "admits the facts alleged" in this paragraph of the complaint, "except to the extent of the conclusion inferable therefrom that the 'employees' therein described were employees of the respondent within the meaning of that word as used in the [Act]." Near the close of the hearing in the present proceeding respondent's counsel stated "That the respondent will, if it is finally determined that the respondent's contention as to the definition of the word 'employee' is incorrect, gladly bargain with the Union in this case."

On all of the above, the undersigned finds that on December 20, 1943, and at all times thereafter, the respondent refused to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit, and that the respondent has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

[8] Respondent's counsel said: "Quibbling is possible, but I should say that even if the Company has not had much experience with such requests, the attorney for the Company has had, and the attorney for the Company should have advised the Company that it was such a request."

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relations to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The undersigned has found that the respondent has refused to bargain collectively with the Union as the exclusive reresentative of its employees in the appropriate unit. In order to effectuate the policies of the Act, the undersigned will recommend that the respondent, on request, bargain collectively with the Union as the exclusive representative of its employees within the unit herein found to be appropriate.

Upon the basis of the forgoing findings of fact, and upon the entire record in the case, the undersigned makes the folowing:

CONCLUSIONS OF LAW

1. International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor is a labor organization within the meaning of Section 2 (5) of the Act.

2. All plant guards at the two Indianapolis plants of the respondent, excluding the chief and lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, at all times material herein have constituted a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

58 3. International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor was on November 29, 1943, and at all times thereafter has been, the exclusive representative of all employees in said unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing on December 20, 1943, and at all times thereafter to bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with

the American Federation of Labor as the exclusive representative of its employees in the appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law and upon the entire record in the case the undersigned recommends that the respondent, E. C. Atkins and Company, Indianapolis, Indiana, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor as the exclusive representative of all plant guards at its two Indianapolis plants, excluding the chief and lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, as the exclusive representative of all plant guards at its two Indianapolis plants, excluding the chief, and lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately in conspicuous places throughout its two Indianapolis, Indiana, plants and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to the employees stating: (1) that the respondent will not

59 engage in the conduct from which it is recommended that it cease and desist in paragraph 1 (a) and (b) of these recommendations; and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of these recommendations;

(c) Notify the Regional Director for the Ninth Region in writing within ten (10) days from the receipt of this Intermediate Report what steps the respondent has taken to comply herewith.

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report the respondent notifies said Regional Director in writing that he has complied with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, effective November 26, 1943, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

Charles E. Persons,
CHARLES E. PERSONS,
Trial Examiner.

Dated: February 19, 1944.

60 [Title omitted.]

Affidavit as to service

DISTRICT OF COLUMBIA, *ss:*

I, Georgie Coates, being first duly sworn, on oath saith that I am one of the employees of the National Labor Relations Board, in the office of said Board in Washington, D. C.; that on the 30th

day of May 1944, I mailed postpaid, bearing Government frank, by registered mail, a copy of the Decision and Order [and Intermediate Report] to the following named persons, addressed to them at the following addresses: International Association of Machinists, District 90 and Local 1683, Att: Messrs. F. M. Richardson, Carl Cedarquist and Wm. J. Layton, 49½ S. Delaware Street, Indianapolis, Indiana; E. C. Atkins and Company, 402 S. Illinois Street, Indianapolis, Indiana; Barnes, Hickam, Pantzer & Boyd, 1313 Merchants Bank Building, Indianapolis 4, Indiana.

(S) GEORGIE COATES.

Subscribed and sworn to before me this 30th day of May 1944.

[SEAL] KATHRYN B. HARRELL,
Notary Public, D. C.

My commission expires March 1, 1947.

63–64 Before the National Labor Relations Board
Ninth Region

Case No. 9–R–1200

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90 AND THEIR AFFILIATE, LOCAL 1683

ROOM 247, FEDERAL BUILDING,
INDIANAPOLIS, INDIANA,
Friday, September 24, 1943.

The above-entitled matter came on for hearing, pursuant to notice, at 1:30 o'clock p. m.

Before THOMAS E. SHROYER, Trial Examiner.

Appearances

Mr. Kurt F. Pantzer, 1313 Merchants Bank Building, Indianapolis, Indiana, and Mr. Lewis D. Spencer, 1313 Merchants Bank Building, Indianapolis, Indiana, for E. C. Atkins and Company.

Mr. F. M. Richardson, 49½ South Delaware Street, Indianapolis, Indiana, and Mr. Walter B. Heisel, Jr., 49½ South Delaware Street, Indianapolis, Indiana, for the International Association of Machinists.

65

PROCEEDINGS

Trial Examiner SHROYER. The hearing will come to order. This is a formal hearing in the matter of the E. C. Atkins and Company and International Association of Machinists, District 90 and their affiliate, Local 1683. This is case number 9–R–1200. The Trial

Examiner appearing for the National Labor Relations Board is Thomas E. Shroyer. Counsel will please state all appearances for the record.

Mr. RICHARDSON. F. M. Richardson, 49½ South Delaware Street, Indianapolis, Indiana, and Walter B. Heisel, Jr., 49½ South Delaware Street, Indianapolis, Indiana, for the International Association of Machinists.

Mr. PANTZER. Kurt F. Pantzer and Lewis D. Spencer, 1313 Merchants Bank Building, Indianapolis, Indiana, for the employer the E. C. Atkins Company.

Trial Examiner SHROYER. I wish to inform all parties that the official reporter makes the only official transcript of these proceedings. Citations in briefs or arguments based upon the record directed to the Board must cite the official transcript in all references to the record. The Board will not certify any transcript other than the official transcript for use in any other litigation.

It may become necessary to make corrections in the record during the hearing. If so, the party desiring the correction
66 will submit the suggested correction to the other party or parties in writing. When this has received the written approval of the other parties it will be submitted to the Trial Examiner. In the event the parties are unable to agree upon proposed corrections, the Trial Examiner will then consider motions to correct the record or may, upon his own motion, order certain corrections made in the transcript. If the parties have been unable to agree upon such corrections before the close of the hearing but have entered into a stipulation concerning such matters after the close of the hearing, stipulations or motions with respect to corrections in the transcript or record should be directed to the Board in Washington inasmuch as the Trial Examiner's connection with the case ceases upon the closing of the record at the end of the hearing.

This is a formal hearing and I request that you maintain the decorum that accompanies judicial proceedings.

There will be no smoking in the court room at any time.

Concise statements of reasons for motions or objections will be permitted, but the Trial Examiner may go off the record for the purpose of hearing extended argument. "Off the record" discussion or argument will not be included in the official transcript unless an order to that effect be made by the Trial Examiner, either upon the request of any of the parties or upon his own motion. All requests to go off the record are to be directed
67 to the Trial Examiner and not to the official reporter.

The Trial Examiner will allow an automatic exception to all adverse rulings during the course of the hearing and upon

appropriate order an objection and exception will be permitted to stand to an entire line of questioning.

Five copies of all pleadings submitted during the hearing are to be filed with the Trial Examiner.

At this time I am marking as Board's Exhibit 1-A for identification the original Notice of Hearing in this case signed by Rosemary S. Macke on September 16, 1943, to which is attached an original petition signed by F. M. Richardson on September 10, 1943. I am marking as Board's Exhibit 1-B for identification a copy of Trial Examiner's Statement in "R" Cases. I am marking as Board's Exhibit 1-C for identification an Affidavit of Service to which are attached Return Receipts.

Mr. PANTZER. The subject of the motion I am going to make on affidavits submitted will show no objection to the exhibits, Mr. Examiner.

Mr. RICHARDSON. There is no objection.

Trial Examiner SHROYER. There being no objection the same are received in evidence.

(Whereupon, the documents heretofore marked for identification as "Board's Exhibits 1-A to 1-C," inclusive were received in evidence.)

68 Trial Examiner SHROYER. Inasmuch as the Notice of Hearing says that this case will come on at 10:00 o'clock, at this time I would like to mark for identification as Board's Exhibit 2 Telegram directed to both the Company and the attorney for the company, Mr. Pantzer, and the Union, notifying all parties of the hearing in that it had been postponed until 1:30 today. I now offer Board's Exhibit 2 in evidence. Is there any objection?

Mr. PANTZER. No objection. We received a copy of such telegram.

Trial Examiner SHROYER. You also did, Mr. Richardson?

Mr. RICHARDSON. Yes, sir.

Trial Examiner SHROYER. There being no objection, it is admitted in evidence.

(Whereupon, the document heretofore marked for identification as "Board's Exhibit 2" was received in evidence.)

Trial Examiner SHROYER. May I ask if there are present at the hearing any other interested unions or parties? Let the record show that no one answered the Examiner's question. I believe you stated you had a motion to make, Mr. Pantzer?

Mr. PANTZER. I have. I wish to say that my motion at this time would be premature, and so I shall renew it at the close of

all the evidence. The employer, E. C. Atkins and Company,
69 moves to dismiss the petition for investigation, which is included in Board's Exhibit 1, for the reason that E. C. Atkins and Company is not and cannot be an employer within the meaning of Section 2, Subsection 2 of the National Labor Relations Act with respect to Auxiliary Military Police who wholly constitute the bargaining unit set forth in Item 4 of the Petition for Investigation, and further, for the reason that the employees referred to in such Petition cannot come within the definition of the word "employees" under the provisions of Section 2, Subsection 3 of the National Labor Relations Act with respect to the alleged employer, E. C. Atkins and Company, they are not in the sense in which the word "employee" is used in the Statute, the relationship of employer and employee with their various interests never having set in and not at this time existing.

Trial Examiner SHROYER. At this time the testimony will refer to motion to dismiss and go to the Board for ruling. You may renew your motion at the close of the hearing if you desire.

Mr. PANTZER. For the purpose of the record then, if you are going to refer it to the Board, so that there will be no failure on my part through oversight, I wish the motion to be renewed.

Trial Examiner SHROYER. It may be so considered.

Mr. PANTZER. Does that have your permission?

70 Mr. RICHARDSON. Yes, sir.

Mr. PANTZER. Thank you.

Trial Examiner SHROYER. With regard to the Interstate Commerce data handed to the Examiner, will you now read that into the record, Mr. Pantzer?

Mr. PANTZER. "E. C. Atkins and Company (hereinafter referred to as the "Employer") is a corporation organized and existing under the laws of the State of Indiana, with two plants in Indianapolis, Indiana. The main plant in Indianapolis, which occupies two entire city blocks and is bounded on the north by South Street, on the west by Capitol Avenue, and on the east by Illinois Street, and on the south by Merrill Street, has been in operation since 1857. The Federal Government owns the new armor plate plant employed by the Employer in war production at the southeast corner of 21st Street and Northwestern Avenue.

"The Employer is engaged in the business of manufacturing and selling saws; tools and armor plate (hereinafter referred to as the "Business of the Company").

"The facts bearing upon the question of whether the Employer is engaged in interstate commerce, and whether a question of representation affecting commerce arises, in this cause, are as follows:

"1. The principal raw materials used in the Business
71 of the Employer are steel, castings, and lumber (hereinafter referred to as the "Raw Materials").

"2. Approximately eighty per cent (80%) of the Raw Materials used in the Business of the Employer is purchased and shipped in interstate commerce from sources outside the State of Indiana.

"3. Approximately eighty per cent (80%) of the finished products produced by the Employer is sold in interstate commerce to purchasers outside the State of Indiana.

"4. During the calendar year 1942, the Raw Materials used in manufacturing the finished product of the Employer was in excess of $500,000.00.

"5. During the calendar year 1942, the gross sales price of the finished product sold by the Employer was in excess of $1,000,000.00.

"6. The Employer ships its finished products by rail and truck.

"7. The finished product of the Employer is disposed of to the United States Government, jobbers, dealers, subcontractors, and direct to manufacturing consumers.

"8. The Employer advertises through industrial magazines and periodicals.

72 "9. During the Calendar year 1943 to the date of this hearing, the manufacturing and selling operations of the Employer have continued substantially along the same lines as those related, concerning the year 1942, in the preceding sections hereof.

E. C. ATKINS AND COMPANY."

Trial Examiner SHROYER. Mr. Richardson, do you accept the statement?

Mr. RICHARDSON. I do, yes, sir.

Trial Examiner SHROYER. It may be so accepted. Thank you very much, Mr. Pantzer, for a very complete statement. I appreciate it.

Mr. PANTZER. We are also willing to make the admission that we are engaged in interstate commerce within the meaning of the jurisdictional provisions of the National Labor Relations Act.

Trial Examiner SHROYER. Thank you, very much. Mr. Pantzer, will you stipulate that International Association of Machinists, District 90 and their affiliate, Local 1683, is a labor organization, at least within the meaning of Section 2, Subsection 5, National Labor Relations Act?

Mr. PANTZER. Naturally, because of the motion I made at the beginning of the case, I should prefer not to enter into that stipulation but to hear the evidence on it, and if I might at this moment depart from the usual order of procedure in these hearings,
73 I should like to submit to you an application for subpoena duces tecum directed at F. M. Richardson to produce union records, which I have marked for identification as "Employer's

Exhibit No. 1," the original of which I hand to you, and a copy of which I hand to Mr. Richardson for his information.

Trial Examiner SHROYER. I notice, Mr. Pantzer, you marked this Employer's Exhibit No. 1.

Mr. PANTZER. For identification.

Trial Examiner SHROYER. Is there any objection?

Mr. RICHARDSON. No objection.

Trial Examiner SHROYER. There being no objection, Employer's Exhibit No. 1 is admitted.

(Whereupon, the document heretofore marked for identification as "Employer's Exhibit No. 1" was received in evidence.)

Trial Examiner SHROYER. Now, with reference to the application for subpoena duces tecum directed at Mr. Richardson, the testimony will correct the application insofar as Number one is concerned, for the charter, constitution, and bylaws of the union. I wish, however, Mr. Pantzer, before I rule the second part, if you will state for the record just how the things requested under Number 2 would go to show whether or not this was a labor organization within the meaning of Section 2, Subsection 5½. Do you wish to comment further than the motion and the paper
74 itself?

Mr. PANTZER. It is the contention of the Employer that the word "Employee" as used in the Wagner Act has the common-law definition of "Employee" and that the word "Employer" has the common-law definition of "Employer," except to the extent that the Wagner Act may expressly have changed the meaning at common law. That position has been supported by a number of decisions of the Supreme Court, notably the decision of Chief Justice Hughes in the VonSteigl case. When I stated that the incidence of the relationship of employer and employee at common law remained the same under the Wagner Act except to the extent that those incidents might have been changed. One of those incidents which had been changed was, as the Examiner said, the right to discharge an employee for striking. He said, "The right so to discharge had existed at common law and unless it was affected by the language of the Act, continued." He pointed out that the language of the Act had changed. That incident had abrogated the right to discharge for striking, but that it had not abrogated any of the other incidents of discipline, of power over the employees that the employer had at common law. With that preface now, I turn to the question of the Examiner. It is the contention of the Employer that the search of the documents referred to in Item 2 of the Application for subpoena duces
75 tecum will *will* throw a light upon the major thesis of the Employer; namely: that the relationship of the employer and employee cannot exist in the case of an employer subject to

Federal supervision by the Military and an employee actually enrolled in and sworn into the Military. Many of the incidents of the relationship between employer and employee at common law are not abrogated and do not and cannot exist under such circumstances.

Now, for instance, the minute book of the union may well throw light upon the manner in which the union proposes to proceed. If the purposes of organizing this particular union are sufficiently definite, we may even establish by the facts adduced from that book that the union is attempting to organize employees of the United States, which is expressly prohibited by the Wagner Act.

Certainly those documents will help to throw light upon the relations which exist in this particular case—constrained, restricted, cramped, straight-jacketed as it is by Military supervision. I cannot say to you definitely what particular fact I shall find in those books. They have not been made available to me, but it is the same kind of information which the Labor Board is accustomed to experience from employers—lists of employees, minute books, correspondence, corporate records, pay rolls, treasury data, matters of that sort.

76 Trial Examiner SHROYER. At this time the Examiner will acknowledge your request for subpoena duces tecum as to the items mentioned in Number 2 of your request. With reference to the charter or constitution and bylaws, do you have those available, Mr. Richardson?

Mr. RICHARDSON. Yes.

Trial Examiner SHROYER. Do you have them with you?

Mr. RICHARDSON. No, sir. I didn't carry a charter 3 x 4 feet.

Trial Examiner SHROYER. I suggest we take a five-minute recess and have them brought to the courtroom.

Mr. RICHARDSON. Do you want that charter brought here?

Trial Examiner SHROYER. Yes. I have no doubt, Mr. Pantzer, you will be satisfied with a copy of the charter?

Mr. PANTZER. I should like to have a photostat of the thing made or a typewritten copy and have that put in evidence rather than deface the charter, which naturally you want to keep in as nice condition as possible.

Mr. RICHARDSON. We have no photostatic copy. We have the charter, the constitution, and the bylaws.

Trial Examiner SHROYER. May I suggest we take a five-minute recess while you go and telephone your office girl and have her make a typewritten copy of what is on the face of the charter and bring both the charter and the copy to the hearing. We will take a five-minute recess.

77 (Whereupon a five-minute recess was taken.)

Trial Examiner SHROYER. Mr. Richardson informs me that he has made arrangements to have the constitution and by-laws brought in. We might skip that point for the moment and proceed.

With regard to how the question arose, Mr. Richardson, was any request for recognition of bargaining rights made?

Mr. RICHARDSON. Yes, sir, there was. There was a request. The union wrote a letter to the company asking for recognition. The letter was never answered.

Trial Examiner SHROYER. You have a copy of that letter?

Mr. RICHARDSON. Yes, sir.

Trial Examiner SHROYER. I will mark this Board's Exhibit 3 for identification. Is there any objection?

Mr. PANTZER. There is no objection to that and the Employer admits that the original of that letter was received in due course of mail.

Trial Examiner SHROYER. Thank you. It may be admitted as Board's Exhibit 3.

(Whereupon, the document above referred to was marked for identification as "Board's Exhibit 3" and received in evidence.)

Trial Examiner SHROYER. Well, Mr. Richardson, following the writing of this letter on August 18, did you receive any reply from the Company?

78 Mr. RICHARDSON. No, sir. We received no reply from the Company until we were called before the Board. We were before the Board then and filed a petition for election, and the union and the company met before the Board and the certification we have here was made out.

Trial Examiner SHROYER. I take it, Mr. Pantzer, that the Company still declines to recognize and bargain with the union?

Mr. PANTZER. That is correct.

Trial Examiner SHROYER. At this time, I am marking Board's Exhibit 4 for identification, which is a statement of field examiner concerning claims of authorization for the purpose of representation.

Mr. PANTZER. May the record show that it is not because of anything personal with Mr. Richardson and his associates that that position is taken, but for the reasons already indicated by the Employer's motions and statements heretofore.

Trial Examiner SHROYER. I will now hand Board's Exhibit 4, which I have marked, to the parties for examination.

Mr. PANTZER. The Employer objects to the introduction of Board's Exhibit 4 for the reason that it purports to introduce into the record so that the information is not available, or subject, to examination or cross-examination by the Employer. Information

from membership cards, the application for subpoena to
79 adduce which has been denied by the Trial Examiner. The Employer further objects to the introduction of Board's Exhibit 4 because the information therein contained is pure hearsay and further because the information therein contained is not the best evidence, being that the best evidence would be the membership cards themselves.

Trial Examiner SHROYER. With reference to the objection to the admission of Board's Exhibit 4, I would like to say, as the Board said in a recent case, being case No. R-5787, that "Authorization or membership cards are required not as proof of the precise number of employees who desire to be listed, by labor organization, or as a basis for determining the appropriate representative, but simply to provide a reasonable safeguard against the indiscriminate institution of representation proceedings by labor organizations, which might have little or no membership in the unit claimed appropriate."

This statement is adequately provided for by statement of the Regional Director made on the basis of the pay-roll check in which signatures on cards are not compared with the actual signatures of employees, but with the names.

Trial Examiner SHROYER. I overrule the objection and admit Board's Exhibit 4 in evidence. Mr. Richardson, did you see this?

Mr. RICHARDSON. I did.

80 (Whereupon, the document heretofore marked for identification as "Board's Exhibit 4" was received in evidence.

Trial Examiner SHROYER. Mr. Richardson, in your certification I note that you claim the following unit to be appropriate: All plant guards employed by the Company at its two Indianapolis, Indiana, plant, E. C. Atkins and Company; and Fall Creek Ordnance Plant, excluding sergeants, lieutenants, captains, and chief. I take it you still contend that is not an appropriate union?

Mr. RICHARDSON. Yes, sir.

Trial Examiner SHROYER. Do you have any witness to introduce?

Mr. RICHARDSON. Yes, sir; Mr. Gann.

Trial Examiner SHROYER. Off the record.

(Off the record.)

Trial Examiner SHROYER. On the record.

WALTER C. GANN, called as a witness by and on behalf of International Association of Machinists, a union, being first duly sworn, was examined and testified as follows:

Trial Examiner SHROYER. Give your name and address to the reporter.

The WITNESS. Walter C. Gann, 331 South Wolcott Street, Indianapolis.

81 Direct examination by Mr. RICHARDSON:

Q. Where are you employed, Mr. Gann?

A. At E. C. Atkins and Company, 402 South Illinois Street.

Q. How long?

A. Since January 21, 1943.

Q. What is your position?

A. My position is as guard member of the Auxiliary Military Police.

Q. Are you acquainted with all the duties of guards?

A. I am.

Q. Do they all wear uniforms?

A. Yes, sir.

Q. They all carry guns?

A. Yes, sir.

Q. Have they been sworn in as Auxiliary Military Police?

A. Yes; I think they all have unless there be one or two new ones that haven't.

Q. That is the general procedure?

A. That is the general procedure—sworn in as soon as possible.

Q. What, in general, do guards do?

A. In general, they guard the plant, supposed to obey all the general orders and specific orders which the Company asks us to obey.

82 Q. Let me ask you a question here; if this is about guards' duties, do you watch the gates or entrances to the plants, and the exits? Do you maintain order, escort visitors, direct traffic, make out passes? Do guards make out passes?

A. No; the guards do not make out passes.

Q. Watch for suspicious circumstances around the plant?

A. That is right.

Q. And fire? You look out for fires—duties and things like that?

A. That's right.

Q. Now carry cash to the different places in the plant?

A. On certain posts we do. Not at all posts.

Q. That, in general, is about what constitutes the duties of the guard, isn't it?

A. That's right.

Q. Now, with regard to workers, do you observe the production workers? Do you observe them at their posts? Do guards go through the plant and watch production workers and what they are doing?

A. At times we do.

Q. If you see a production worker doing something wrong, what you thought was wrong, what do you do?

A. I would see my lieutenant and tell him and he probably would take it up with our chief or maybe, if the chief can't be located, he would see his foreman about it.

Q. In other words, if you saw a production worker doing something you thought was wrong or out of line or might
83 be sabotage, you would not correct that production worker. You immediately report to your superior?

A. Well, that depends. If he is doing something drastically wrong, right there, of course I would take it upon myself to protect the plant, but if it was a minor thing, of course, for instance, he got, oh, got a little bit up in the air about showing his pass, then I would; sometimes, not often, a fellow will really get up in the air about your asking him to show his lunch kit or open a package, well, I would report anything like that to the lieutenant and he would take it up with the proper one.

Q. Do you, when you are hired and go to work there, are you told to take any disciplinary action over anybody in the plant? Do you have any right to arrest anybody in the plant without first calling your superior?

A. Yes, we do.

Q. However, the main thing you do is report it to your immediate superior; is that right?

A. That's right.

Q. If you see things out of line?

A. Yes; regardless whether the arrest is made or not. It is reported to our superior.

Q. Immediately?

A. As soon as possible.

Q. Who hires the guard?

84 A. The personnel manager and the chief.

Trial Examiner SHROYER. What personnel manager?

The WITNESS. Our personnel manager.

By Mr. RICHARDSON:

Q. Of the Atkins company?

A. Of E. C. Atkins and Company.

Q. Who pays him?

A. E. C. Atkins and Company, as far as I know.

Q. Are you paid in checks?

A. Paid in checks.

Q. Signed by E. C. Atkins and Company?

A. That is right.

Q. Who has the authority to discharge you?

A. The personnel manager or the chief, I would think, of E. C. Atkins and Company.

Q. Who sets your rate of pay?

A. E. C. Atkins and Company.

Mr. RICHARDSON. I think that is about all I wish to ask.

Trial Examiner SHROYER. Any questions?

Mr. PANTZER. Yes.

Cross-examination by Mr. PANTZER:

Q. Gann or Jann?

A. Gann, G-a-n-n. Yes, sir.

Q. Mr. Gann, you stated you were employed January 21, 1943?

A. That's right.

85 Q. Mr. Gann, at that time you executed an application for membership, is that right?

A. That's right.

Q. And that application was on a printed form which was available at the personnel office of E. C. Atkins and Company?

A. Yes, sir.

Q. How soon after that application was signed were you assigned to military duty as an Auxiliary Military Police at the Atkins Company plant?

A. The following day I went to work on the Auxiliary Police.

Q. You had never worked at the Atkins Company place before that assignment?

A. No, sir.

Q. State whether or not it's the custom either before or shortly after the assignment of a new Military Policeman to duty to have him sign a contract with the United States Government, take the oath to defend the Constitution, and be sworn in by an officer of the United States Army?

A. That's right. I have that in my billfold right now.

Q. May I look at that, please?

A. Here is the card.

Q. Have you an identification card?

A. Here it is.

Q. When you were enrolled at the Atkins plant then you signed this document which you have just produced from

86 your wallet an unsigned copy of which, with all blanks vacant, marked Employer's Exhibit No. 2, I show to you. That is marked for identification.

A. That's right. It's identical.

Q. It's identical? And the blanks are filled in as follows: Are they not, Mr. Gann? The top blank has your name, Walter C. Gann? The next blank being the one in the second paragraph, has again your name, Walter C. Gann—the first one in the second paragraph? The second blank, E. C. Atkins and Company, and

the third blank, 402 South Illinois Street, and then the contract is signed at the right, Walter C. Gann, and at the left, High A. Johnston, Chief of Guards, January 27, 1943?

A. That's right.

Mr. Pantzer. The Employer now offers in evidence Employer's Exhibit 2, giving a copy thereof to Mr. Richardson for his file.

Trial Examiner Shroyer. Is there any objection, Mr. Richardson?

Mr. Richardson. No.

Trial Examiner Shroyer. Admit it as Employer's Exhibit No. 2.

(Whereupon the document heretofore marked for identification as "Employer's Exhibit No. 2" was received in evidence.)

87 By Mr. Pantzer:

Q. You have produced from your wallet the identification card of which you spoke, entitled Plant Guard Identification Card, signed by B. R. Wetenhall, Captain Corps Military Police, District Plant Guard Officer, Continuous Security District Office, Cincinnati, Ohio, is that right?

A. Yes, sir.

Q. Now I ask you, in order that you don't have to put your card in evidence, and in that way not get it back, whether in all substantial particulars excepting the name, the date, and so forth, it is similar to the plant guard identification card which I show you in photostatic form of Henry A. Johnston, and which I have designated as Employer's Exhibit No. 3?

A. Yes, sir.

Q. And this has been blown up and the blank put across it in white so as not to violate the regulations against counterfeiting such cards. Mr. Gann, that is the only reason it is blown up.

A. Surely, and that is identical with the guard picture which I have.

Q. I now offer Employer's Exhibit No. 3 in evidence and hand the copy to Mr. Richardson.

Trial Examiner Shroyer. Is there any objection, Mr. Richardson?

88 Mr. Richardson. No.

Trial Examiner Shroyer. If there is no objection, it is admitted as Employer's Exhibit No. 3.

(Whereupon, the documents heretofore marked for identification as "Employer's Exhibit No. 3" was received in evidence.)

By Mr. Pantzer:

Q. Mr. Gann, in addition to signing the contract with the United States Government, which is Employer's Exhibit No. 2, you also were sworn in, is that right?

A. That's right.

Q. And in addition to that contract you took a verbal oath of office to support the Constitution of the United States in substance and the Military authorities?

A. Yes, sir.

Q. That oath was almost identical with certain of the language in the contract, is that not so?

A. That's right.

Q. Or do you recall?

A. Yes; that's right.

* * *

89 Q. By the general orders you mean they are issued by the Government itself?

A. That's right.

Q. And as between a Government order and a Company order, which do you consider as having priority?

A. Well——

Q. The Military?

A. I would say one would be just as important as the other. The general orders deals with our particular—deals with the guard at general, while special orders would deal with some particular post and I would say one was just as important as the other.

Q. Well, these special orders then relate to your military duties?

A. That's right.

Q. By whom are they issued?

A. They are issued by the company commander.

Q. Who is the company commander?

A. Mr. Wetenhall, of course, of the Government. I mean now the Government issues the general orders, but I mean we get all of the dope, procedure, from Mr. Wetenhall pertaining to the Auxiliary Military Police. The general orders originate from the Company.

Q. How do you spell that name?

A. Wetenhall, W-e-t-e-n-h-a-l-l.

90 Trial Examiner SHROYER. The same man who signed the card which he has in his possession and also Employer's Exhibit No. 3?

The WITNESS. Yes.

Trial Examiner SHROYER. Thank you.

By Mr. PANTZER:

Q. It is not Mr., but captain, is it not?

A. That's right.

Q. And when you said "company orders" you did not mean the E. C. Atkins company, but the military company to which you belong? They are the lieutenants, the assistant chief, the chief, and then Lt. Scanlon and Capt. Wetenhall?

A. Well, that's true.

Q. Special orders come from that company?

A. What I meant was they are different from the general orders in this way, that they apply to a particular post while the general orders are for the whole guard in general.

Q. So that your obligations to carry out specific tasks are directed by Capt. Wetenhall, Lt. Scanlon, Chief Johnston, the four lieutenants under Chief Johnston, and the military regime that you are working with?

A. That's right.

Q. Do I understand that you swore to observe and obey the Articles of War?

A. That's right.

91 Q. Do I understand that you swore to observe and obey the Articles and these Articles are read to you and that you are required to study them?

A. Yes.

Q. Where does that course of instruction take place?

A. We have military school each Monday for a period.

Q. Where is that situated? At the plant?

A. At the Ipalco Club Building. Indianapolis Power and Light Building. Each Monday for a period of one hour.

Q. Located near the plant?

A. No; not near the plant.

Q. Under Military supervision?

A. That is true.

Q. Who conducts the classes and instruction there?

A. An army lieutenant.

Q. Lt. Scanlon?

A. Lt. Scanlon.

Q. And he is a regular lieutenant?

A. That is right.

Q. He worked his way up through the ranks?

A. I imagine he did unless he got a commission.

Q. You don't know then?

A. No.

Q. When you undertake to arrest anyone while you are on your post, you do it by virtue of the authority of the

92 Military authorities, is that not right?

A. That's right.

Q. Have you ever studied the Manual of Interior Guard Duty?

A. Yes, sir; when I first went to work at the plant, I studied the Interior Guard Book.

Q. You were familiar with the fact that your general orders are to take charge of this post and all plant and Government property?

A. That's right.

Q. "To walk my post in a military manner keeping always on the alert and observing everything that takes place within sight or hearing"?

A. Yes.

Q. "To report all violations of orders I am instructed to enforce"?

A. Yes, sir.

Q. Who instructs you to enforce those orders?

A. The Government.

Q. The Military? The Military Government?

A. Military Government.

Q. Military Police?

A. That's right.

Q. Those instructions never come from Mr. Wood, who is here in the court room, or Mr. Atkins, or any of the
93 foremen in the Atkins plant? Your orders come from the Military alone, is that not so?

A. Mainly so, I would say. Of course, they might have a special order which they would expect us to carry out. That might not necessarily be military but it would be mainly. Our orders would be mainly from the military source, of course.

Q. To whom do you report the violation, to Mr. Wood?

A. No; we report the violations to either the lieutenant or the Chief, if he happens to be there.

Q. The Chief, Chief Johnston?

A. Yes, sir.

Q. At which plant do you work?

A. 402 South Illinois Street.

Q. At the main plant, the old plant?

A. Yes, sir.

Q. Who was the person in the personnel office who as you said, hired you on January 21, 1943?

A. Well——

Q. Do you know his name?

A. I first appeared at Mr. Wood's office and then was sent down to the Transportation Office to Mr. Andrews, and Mr. Andrews is the one that hired me.

Q. Do you know personally whether or not Mr. Andrews hired you without first consulting the Military Police?

94 A. No; I do not know.

Q. Did you, or do you ever get any of these directives for your information that are handed out by Lt. Col. A. C. Rasmussen, who is the District Chief of the Continuous Security District Office at Cincinnati?

A. I haven't received one, I don't think.

Q. Did they have those posted down at 16th and Alabama Street at the Elpaco Office?

A. I haven't seen any posted. However, we do have a set of guard rules, a long poster of guard rules put up in those places in the plant pertaining to the Auxiliary Military Police, but I haven't seen a document like that.

Q. I now show you a document which is dated June 7, 1943, relating to the subject, The Auxiliary Military Police, and ask you to read paragraph No. 25, the first sentence. Is that the testimony you were at?

A. "A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign, if the plant guard officer or other responsible army representative believes that the efficiency of this plant guard force would be impaired and declines to give his approval thereto."

Q. In other words, your employment on January 21 did not become effective until the Military Police had given their approval to that employment, is that not so?

A. Well, my employment started January 21, although I
95 wasn't inducted until August. My employment started on January 21, but I was not inducted until January 27, but my salary started from the date I was employed.

Q. That's right, as I understand it. But you were sworn in, I believe, on the 27th of January, is that the date on your card?

A. Yes, sir.

Q. From the 21st of January to the 27th of January you were an employee of E. C. Atkins and Company?

A. Yes, sir.

Q. They pay you whether you are their employee or whether you are a military policeman, but from January 27 you became a military policeman and were no longer an employee of E. C. Atkins and Company, as you had been up to January 27? Your status changed, did it not?

A. That's right. I wasn't a member of the Auxiliary Military Police until I was inducted January 27.

Mr. PANZER. In order that the Trial Examiner and Mr. Richards may both follow the thought of this examination, I beg to offer in evidence Employer's Exhibit No. 4, which is the directive from which I have just cross examined Mr. Gann and which has the paragraph that I referred to, Paragraph No. 25, in it. Mr. Richardson may want to do some redirect examination later on and I want to make the document available.

96 Trial Examiner SHROYER. Are there any objections?

Mr. RICHARDSON. No.

Trial Examiner SHROYER. There are no objections so it will be admitted as Employer's Exhibit No. 4.

(Whereupon, the document heretofore marked for identification as "Employer's Exhibit No. 4" was received in evidence.)

By Mr. PANTZER:

Q. Are you a member of the local union that is petitioning here?

A. I am.

Q. How long have you been a member?

A. Since August, this year.

Q. Are you an officer of the local?

A. I was elected to the negotiating committee.

Q. Have the local at this time elected a president, vice president, secretary, treasurer, and so forth?

A. No, sir.

Q. Where were you elected a member of the negotiating committee?

A. At 491½ South Delaware.

Q. Do you have available the minutes of that meeting?

A. I do not.

Q. Do you know whether or not minutes were taken?

A. No; I don't know.

Q. Do you know?

97 A. I wasn't present at the meeting and I don't know.

Q. You weren't present?

A. I wasn't present.

Q. Do you know whether or not the statement has been made in the organizational activities of the local union that their desires to force the closed shop were true if it is recognized as a bargaining agent?

A. No; I do not. I wouldn't say that I do.

Q. Have you been at any of the meetings of the membership?

A. Yes, sir; I have.

Q. You do not know whether that point was discussed?

A. I don't believe that it has been. I don't think it has been discussed up until now.

Mr. PANTZER. That's all. Thank you.

Trial Examiner SHROYER. Any further question?

Mr. RICHARDSON. Just a minute.

Redirect examination by Mr. RICHARDSON:

Q. When you were taken in as a member of Local 1683, you do know and realize that the local has been established for over a year, and that there are members of that local?

A. Yes, sir.

Q. That's all.

Re-cross examination by Mr. PANTZER:

98 Q. Is this a local that represents employees of more than just the Atkins plant?

A. Yes, sir.

Q. What are the other plants represented?

A. Well, I know the Curtiss-Wright.

Q. The Curtiss-Wright Corporation, Propeller Division Plant in Indianapolis.

A. The Morris and Kentucky Avenue plant, isn't it?

Q. The old Marmon plant.

A. Yes.

Q. Are they all in the same local that's trying to organize the Atkins company?

A. That's correct.

Q. What other plants are represented in the membership of that local?

A. Marmon-Harrington Company, Merz Engineering, Indianapolis Tool and Die Company. The Marmon-Harrington Company manufactures tanks.

Q. For the armed forces, does it not?

A. I believe so.

Q. It is a pioneer in tank manufacture under the leadership of Col. Harrington.

A. That's right.

Q. The Tool and Die Company has no direct war contracts, has it?

Mr. RICHARDSON. He is mistaken. It is not the Tool
99 and Die Company. It is the International Machine Tool Company, rather than the Indianapolis Tool and Die.

WITNESS. That was a mistake on my part.

By Mr. PANTZER:

Q. If this union organizes the Atkins company it will not be a separate local covering just so-called Atkins' employees, but employees of these other plants you have mentioned and perhaps other plants in addition thereto?

A. Well, I am not sure about that. I know only the guards of our plant and the guards of Kall Creek Ordnance are going to be the only guards under the one contract if it is recognized. I know that. But whether the guards of all plants are under the same charter, I do not know.

Mr. PANTZER. That's all.

Trial Examiner SHROYER. Just one or two questions.

EXAMINATION BY TRIAL EXAMINER

By Trial Examiner SHROYER:

Q. As I understand it, you have a captain of the guards, one captain?

A. We have a chief of guards.

Mr. PANTZER. Chief is the title.

By Trial Examiner SHROYER:

Q. Is there also a captain in addition?

A. No; we have a chief and four lieutenants.

Q. You have one chief and four lieutenants at the main plant?

100 A. That's right. I am at the 402 South Illinois. I don't know about the Fall Creek Ordnance.

Q. Are there any other people in the guard set up that you recognize as being in any sense your supervisor?

A. Yes, sir.

Q. Who else?

A. Maybe I didn't understand you right?

Q. You told me you have a chief and four lieutenants. My question is, is there anyone else in this guard set-up which you recognize as being your supervisor?

A. Yes, sir.

Q. Who else?

A. I see Mr. Woods and Mr. Atkins.

Q. I meant within the guard group.

A. No.

Q. Do they have any sergeants?

A. We do not have sergeants or corporals at the plant.

Q. I notice in an answer of one of Mr. Pantzer's questions, you said the company may have special orders that they wish to perform. Have you ever been directed to carry on any special orders?

A. Yes; at one post in particular, where the trucks come in and of course they go out at another gate, unless it is a necessity that they go out that same gate. We have a special order per-

101 taining to those trucks, once in a while a special order.

Q. What kind of an order would you have as an example?

A. Well now, we have certain truck companies that get in on a little different procedure from what other companies do and we may receive special order through that one particular company; see? Or I mean we may receive a special order pertaining to that one company.

Q. Who gives the special order?

A. From the chief.

Q. That is all.

Trial Examiner SHROYER. Are there any further questions?

Mr. PANTZER. Yes.

Recross examination by Mr. PANTZER:

Q. Yes; you said in answer to a question by the Trial Examiner that Mr. Woods and Mr. Atkins were your supervisors. As a matter of fact, they are not your supervisors?

A. I didn't mean—I didn't understand what he said.

Q. I thought your answer was wrong.

A. You meant of the guards? I didn't understand that. I meant over the guard.

Q. Is it not true that the person superior to Chief Johnston is in the Military Police structure, or do you actually know?

102 A. Oh, yes; I am absolutely sure.

Q. The captain we referred to there is Capt. Wetenhall, who signs all major orders down in Cincinnati?

A. That is right.

Q. He comes up and inspects at least once a month or once every two weeks; is that right?

A. I havn't ever been present when he came in. He goes in at the main office.

Q. You heard that he has been around?

A. Yes.

Q. Lt. Scanlon is under him?

A. That's true.

Q. And under him come the two chiefs, Chief Johnston at your plant and Chief Hann at the Fall Creek Ordnance plant?

A. That's right.

Mr. PANTZER. That's all.

Redirect examination by Mr. RICHARDSON:

Q. When you joined this local 1683 you understood that, and you do know that only members in that local and that there is nobody in that local or, nobody covered by that local except plant protection guards?

A. That's right.

Mr. RICHARDSON. That's all.

Trial Examiner SHROYER. That is all. Thank you very much.

103 Trial Examiner SHROYER. Do you have any further witnesses now, Mr. Richardson?

Mr. RICHARDSON. No; I haven't.

Trial Examiner SHROYER. Did you get the information you desired?

We will go off the record.

(Off the record.)

Trial Examiner SHROYER. On the record. Mr. Richardson, you have secured the constitution and bylaws, and I think it might be a good idea for you to be sworn at this time and introduce them in evidence.

FRANK M. RICHARDSON, called as a witness by and on behalf of the International Association of Machinists, being first duly sworn, was examined and testified as follows:

Direct examination by Trial Examiner SHROYER:

Q. Mr. Richardson, because you have informed us you have no counsel present, I will understand that you have the right to object to any questions that I might ask you, or that Mr. Pantzer might ask you. Will you give your full name to the reporter, please?

A. Frank M. Richardson.

Q. Where do you live?

A. 126 South Illinois.

Q. What is your business or occupation?

104 A. Business representative, International Association of Machinists.

Q. How long have you been a business agent for the Machinists?

A. Five years.

Q. Where are your headquarters?

A. 491½ South Delaware Street.

Q. You were directed by the Trial Examiner to produce a copy of your constitution and bylaws. Have you one with you now?

A. Yes, sir.

Q. Will you hand it to me, please? I now mark this for identification as "Petitioner's Exhibit No. 1." Petitioner's Exhibit No. 1 is a copy of your constitution; is that correct?

A. That's right; Grand Lodge constitution and bylaws for the Grand Lodge, and local lodges, too.

Q. When was this constitution adopted?

A. This last one was adopted December—no, adopted December 1940 and amended April '41 and became effective April 1, 1942.

Q. Where do you receive copies of this constitution and bylaws?

A. Grand Lodge, Washington, D. C.

Trial Examiner SHROYER. Is there any objection, Mr. Pantzer, to the introduction of Petitioner's Exhibit No. 1?

105 Mr. PANTZER. I think it is highly proper.

Trial Examiner SHROYER. If there is no objection, it is admitted as Petitioner's Exhibit No. 1.

(Whereupon, the document heretofore marked for identification as "Petitioner's Exhibit No. 1" was received in evidence.)

By Trial Examiner SHROYER:

Q. You were also requested by me to produce your charter.

A. Copy of the charter of Local Lodge 1683.

Q. What you are now handing me is a typewritten paper on one sheet which I will now mark as "Petitioner's Exhibit No. 2" for identification and ask you what it is.

(Whereupon, the document above referred to was marked for identification as "Petitioner's Exhibit No. 2.")

A. It is a copy of the charter for the Local Lodge 1683, Plant Protection Local. The charter.

Q. The charter itself, is that a document in a frame?

A. That's right.

Q. And hangs, I suppose, at union headquarters?

A. It must hang in the meeting place where the local meets.

Q. This paper, Petitioner's Exhibit No. 2, is a copy of what is on that charter?

A. That's right.

106 Q. You have examined this Exhibit 2, have you?

A. Yes, sir.

Q. Can you tell us when this charter was issued?

A. April 1943, second day.

Q. I notice this is Local Lodge No. 1683. You heard the last witness testify to the effect the local admitted to membership employees of concerns other than the Atkins company?

A. That's right.

Q. Did he correctly state the names of the other companies?

A. Yes.

Q. Does Local Lodge No. 1683 have a contract with any of these other companies?

A. Yes.

Q. Will you mention the ones it does have a contract with?

A. It has a contract with everyone we mentioned—Curtiss-Wright, Merz Company, Marmon-Harrington, and International Machine and Tool.

Q. And those are contracts between the Local and the companies covering wages, hours, and working conditions?

A. Yes, sir.

(Whereupon, the document heretofore marked for identification as "Petitioner's Exhibit 2" was received in evidence.)

Trial Examiner SHROYER. You may inquire, Mr. Pantzer.

107 Cross-examination by Mr. PANTZER:

Q. Mr. Witness, I ask you to find for me that portion of the constitution or bylaws of your International Association which qualifies you to organize and represent plant guards?

A. You don't find that in any constitution or no lodge or no other organization. We have been qualified to organize plant guards through our contact with the War Labor Board and been certified as such. The War Labor Board has certified that we are an organization that is entitled to organize plant guards under a plant local.

Q. The only standing which you have as a labor organization, however, arises from the constitution and by-laws which are Board's Exhibit, Petitioner's Exhibit 1?

A. That's right.

Trial Examiner SHROYER: Do I understand the answer to Mr. Pantzer's first question that there is nothing in your constitution or bylaws on the subject of plant guards?

The WITNESS: That's right.

By Mr. PANTZER:

Q. You merely claimed your right, then, as I understand it, Mr. Richardson, to organize the Auxiliary Military Police that are stationed at the Atkins plant by virtue of the general power as a labor union?

A. By authorization of the National War Labor Board. We have been authorized in other plant protection guards to organize by the National War Labor Board, so I see no
108 difference between them and E. C. Atkins and Company.

Q. You mean you have not been authorized by the Labor Board to organize E. C. Atkins and Company as yet?

A. No; not yet.

Q. And consequently, as to the guards stationed at that plant, your only authorization at present is that Petitioner's Exhibit 1? I refer you now to Petitioner's Exhibit No. 2, which is the typewritten copy of the charter, and ask you whether any plant guards stationed at E. C. Atkins Company are charter members on that list?

A. They are not.

Q. Those names on that charter all come from other plants; is that right?

A. That's right.

Q. Do you have a closed shop at Curtiss-Wright Corporation?

A. We do not.

Q. Do you have a closed shop at any of the other plants?

A. We do.

Q. Which ones?

A. All three of the others that I mentioned.

Q. Are you going to attempt to obtain the closed shop at E. C. Atkins Company?

A. I wouldn't want to answer that question.

Q. Will you answer this question, whether or not in your campaign for membership you have told persons that you
109 would have a closed shop?

A. I didn't.

Q. Do you know whether those making solicitation of membership have made such statements?

A. I do not know.

Q. Do you hold any commission under the United States of America or its military authorities?

A. I do not.

Q. Have you had any military experience?

A. Yes, sir.

Q. In the last war?

A. Yes, sir.

Q. Do you hold a commission in the Reserve?

A. I do not.

Q. Have you ever, since the last war which ended in 1918, done any military service?

A. No.

Q. Are you at present connected with a military organization of any kind other than the American Legion or the Veterans of Foreign Wars?

A. I am not.

Q. Are you connected with either of those?

A. Yes, sir.

Q. The Legion?

A. Both of them.

110 Q. Have you ever personally worked as a plant guard?

A. No.

Q. Have you ever personally worked as an Auxilliary Military Policeman?

A. No.

Q. I thank you. That is all.

Trial Examiner SHROYER. That is all. Unless you have something you wish to volunteer?

The WITNESS. No; nothing.

(Witness excused.)

Trial Examiner SHROYER. Mr. Richardson, have you any other witnesses?

Mr. RICHARDSON. Yes, sir.

Trial Examiner SHROYER. Is the Company ready?

Mr. PANTZER. I would like to call Mr. Johnston.

Trial Examiner SHROYER. Mr. Pantzer, there is one point I hope you will be able to bring out. As I understand it, there is more than one plant involved here.

Mr. PANTZER. Yes; I will explain the difference between the relationship of those two plants through Mr. Wood.

HENRY A. JOHNSTON, called as a witness by and on behalf of E. C. Atkins and Company, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. PANTZER:

111 Q. Give your name and address?

A. Henry A. Johnston, RR1, Box 140, Zionsville, Indiana.

Q. You have stated your name and address for the reporter?

A. Yes, sir.

Q. When did you first take a position as an Auxiliary Military Police stationed at the main plant of E. C. Atkins and Company?

A. Well, sir, I went to work there in such capacity in August, last year, and sworn in shortly after by Lt. John Ritchie, of the United States Army.

Q. Had you ever worked at the Atkins company before?

A. No, sir; no.

Q. Did you, when you obtained your employment at the Atkins company, execute an application of employment?

A. Yes, sir; I filled one of those out; yes, sir.

Q. I show you Employer's Exhibit No. 5, being in blank form and ask you whether that is a copy of the application for employment which you then executed?

A. Yes, sir; that's it.

Q. Where was that application executed by you?

A. In the personnel office of E. C. Atkins and Company.

Q. That is the office where it employs regular employees who are in its production and maintenance work, is that right?

A. That's right; yes, sir.

112 Q. Was any representation made to you at the time you were employed that you would be finally accepted and sworn in to the Auxiliary Military Police?

A. No, sir. In fact, I was given to understand that then when I filled the application that it would not be effective without the approval of the United States Government.

Q. State whether or not to your knowledge that statement is made to all who apply for service as Auxiliary Military Police at either of the Atkins plants?

A. Yes, I believe it is; if that is the case, if it is ever overlooked, it is forgotten, but that is the case.

Q. What is your position in the Auxiliary Military Police?

A. I am Chief of the Auxiliary Military Police.

Q. At which plant?

A. South Illinois Street plant.

Q. Main plant?

A. Yes, sir; main plant.

Q. How many lieutenants have you under you?

A. Four.

Q. How many Military Police do the five of you, including your four lieutenants, have under you at the main plant?

A. 32.

Q. Both men and women?

A. No, sir; just men at our plant.

113 Q. But some women are enrolled as Military Police in the ordnance plant?

A. Yes, sir; they are, I believe.

Q. After you signed the application for employment, did you, which is Employer's Exhibit No. 5, you were temporarily assigned to plant patrol work; is that right?

A. Yes, sir.

Q. But were not immediately sworn in?

A. No, sir.

Q. About how soon after you were assigned to work, were you sworn in?

A. It is on the record, could be found out exactly, roughly I would say three weeks.

Q. Do you have with you your plant card, that is, the Plant Guard Identification Card?

A. Yes, sir.

Q. Will you kindly produce it and compare it with Employer's Exhibit No. 3 and state whether or not Employer's Exhibit No. 3 is an accurate and enlarged pho'static copy of the front and reverse of your Plant Guard Identification Card?

A. That's it; yes, sir.

Q. State whether or not you can tell from the Plant Guard Identification Card when you were sworn in to the military service?

114 A. I can't tell from this identification. Yes, that is right [looking at it.] That is the new edition. That is not the one I originally went to work with.

Q. This pass supplants the old one which you had?

A. This pass supplants the old one which I had to turn in to the Federal Government.

Q. This one, Employer's Exhibit No. 3, is a reissue of the original card which you received?

A. Yes, sir. There have been some slight changes, but it is the same basic thing.

Q. Do regular employees in the Production and Maintainance Departments of E. C. Atkins and Company have issued to them Plant Guard Identification Cards?

A. No, sir.

Q. They have issued entirely different identification cards?

A. Yes, sir.

Trial Examiner SHROYER. Mr. Pantzer, did you intend to offer that application of employment?

Mr. PANTZER. The Employer offers Exhibit No. 5 in evidence.

Trial Examiner SHROYER. Is there any objections? It may be admitted as Exhibit No. 5.

(Whereupon, the document heretofore marked for identification as "Employer's Exhibit No. 5" was received in evidence.)

115 By Mr. PANTZER:

Q. When you were finally notified that you had been accepted for the Auxiliary Military Police, did you then and only then sign a copy of Employer's Exhibit No. 2 by an agreement between the United States of America and yourself?

A. Well, that exhibit there is signed by the guard, the member of the Auxiliary Military Police. He is not yet a member. He signed that agreement and oath with the United States and that in turn is immediately forwarded to the Continuous Security District Office and then this pass is issued upon receipt after thorough checking has been given. It's issued on that contract. When you receive this pass then you know that you have been accepted by the Government as one of their representatives in the plant.

Q. If you had failed to sign that agreement, it is true, is it not, and I read from Employer's Exhibit No. 4, Item 20: "If a guard refused to sign the agreement, he may, but need not be temporarily retained with the understanding that he will be dismissed as soon as he is replaced and in any event, within a reasonable time."

A. Yes, sir; that's true.

Q. So that if you had not signed the copy of Employer's Exhibit No. 2, which was submitted to you, you would have been dismissed?

A. That's right.

116 Q. You could not have continued to act as an Auxiliary Military Police at the Atkins plant?

A. No; you couldn't.

Q. Upon your having been sworn into the Service, state whether or not there was issued to you a certificate of membership?

A. Yes, sir; there was.

Q. I now show you Employer's Exhibit No. 6 and ask you whether that is a photostatic copy of the certificate of employment which is issued to you?

A. Yes, sir; that's it.

(Whereupon, the document above referred to was marked for identification as "Employer's Exhibit No. 6.)"

Q. It is under that certificate that you hold your authority as an Auxiliary to the Military Police at this time?

A. That's right.

Q. I note that on that certificate the rank has been left blank. What is your rank?

A. I am the Chief, sir.

Q. Is this the commission that was issued to you when you became chief?

A. Yes, sir.

Q. In other words, I note it is dated June 29, 1943, although you originally joined in 1942?

117 A. Yes, sir; that's right.

Q. At that time you were promoted to chief?

A. No, sir; I have been chief all along.

Q. You were hired as chief?

A. Yes.

Q. Do you know whether any investigation of you was made prior to this, to your being appointed chief?

A. I have been told by army officers that there is a careful investigation made of each man and naturally if anything is found on the record proving that he is not the right type of man for that job, he is not allowed to become a member of the Auxiliary Military Police.

Q. That investigation is made by the Military Authorities?

A. Yes, sir; that is my understanding that it is made by the Cincinnati office.

Q. And it isn't made by the personnel office of E. C. Atkins and Company?

A. No, sir; not to my knowledge.

Q. So that your qualifications to serve as an Auxiliary to the Military Police of the Army of the United States are in the first instance examined by the United States Army and not by the personnel office?

A. That's right; yes.

Q. And you know that that is the process because since your appointment as chief you have become thoroughly

118 conversant with the practices in that respect?

A. Yes, sir.

Q. I now show you——

Trial Examiner SHROYER. Did you offer?

Mr. PANTZER. I offer Employer's Exhibit No. 6 in evidence.

Trial Examiner SHROYER. If there is no objection, it is admitted as Employer's Exhibit No. 6.

(Whereupon, the document heretofore marked for identification as "Employer's Exhibit No. 6" was received in evidence.)

By Mr. Pantzer:

Q. I now show you Employer's Exhibit No. 7 and ask you what that is a photostatic copy of?

(Whereupon, the document above referred to was marked for identification as "Employer's Exhibit No. 7.")

A. That is an honorable discharge issued by the United States Government, Col. Rasmussen being the representative of the Government. That is an honorable discharge from the Auxiliary Military Police and it relieves a man from duty.

Q. Whenever a man is discharged from the Military Police, who discharges him, the personnel office at E. C. Atkins and Company or the Military?

A. The Military discharges him from the Auxiliary Military Police. Now there is one thing that should be said there.

119 He can be relieved of his duty temporarily by myself or by E. C. Atkins and Company, problematically for breaking some rule or otherwise proving that he is not doing his duty; he could be relieved temporarily but he could not be discharged by E. C. Atkins and Company.

Q. That is true by virtue of Section 25 of the Directive, which is Employer's Exhibit No. 4, which reads: "A member of the Auxiliary Military Police may not be employed, dismissed or may not resign if the plant guard officer or other responsible army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto." Is that right?

A. That's right.

Q. Are members of the Military Police, Mr. Witness, ever discharged without an honorable discharge?

A. Yes, sir; they are.

Q. In other words, they are discharged for misconduct, absence without leave, drunkenness, for some military reason?

A. Yes, sir.

Q. I now show you Employer's Exhibit 8 and ask you whether that is the form in which such discharge takes place, it being a discharge referring to the termination of Aye Eldridge.

(Whereupon, the document above referred to was marked for identification as "Employer's Exhibit 8.")

120 Mr. Pantzer. I offer them in evidence later.

A. Yes, sir; that would be a dishonorable discharge.

Q. I now show you Employer's Exhibit No. 9, entitled "The Articles of War" and Appendix 1 to a Manual for Courts Martial, U. S. Army, and ask you whether or not that is a publication promulgated by the Military Police?

A. Yes, sir; you take these copies from the army office. That is the Articles of War.

Q. What do you know about the Articles of War?

A. Every soldier, every sailor, every marine, every member of the Auxiliary Military Police, according to the Articles of War, must have read to him within six days of his enlistment—must have read to him the Articles of War and also according to the Articles of War, he must have them read to him every six months thereafter. That is the Articles of War itself, I believe. These are the regulations under which a soldier lives.

Q. Now, how do you receive the general orders for your duties, from what source?

A. General orders are received from Capt. Wetenhall of the Fifth Service Command, Cincinnati.

Q. I now offer in evidence Employer's Exhibits 7, 8, and 9.

Trial Examiner SHROYER. Are there any objections?

Mr. RICHARDSON. No.

121 Trial Examiner SHROYER. There are no objections and they may be admitted in evidence as 7, 8, and 9.

(Whereupon, the documents heretofore marked for identification as "Employer's Exhibits 7, 8, and 9" were received in evidence.)

By Mr. PANTZER:

Q. I now show you Employer's Exhibits No. 10, 11, and 12 and ask you what they are.

(Whereupon, the documents above referred to were marked for identification as "Employer's Exhibits 10, 11, and 12.")

A. These are general orders from Capt. Wetenhall of the Fifth Service Command District Plant Guard Officer, who is over all the Auxiliary Military Police in this District. These three orders take up different subjects and they are to be followed.

Q. Has General Order 4 been published as yet, to your knowledge?

A. Not to my knowledge; no, sir. These are the three general orders under which we are working.

Q. They are the three orders under which you work?

A. Yes, sir.

Q. I ask you whether or not it is customary in order that all may be advised in addition to the chiefs who are in charge of the Military Police to have the various guarding orders photo-
122 stated and blown up like this one I have in my right hand here so that everybody will know exactly what the authorities, duties, and powers of the Military Police are? I read now from Guard Order No. 1, which is a photostatic replica, enlarged four times, of Employer's Exhibit No. 10 and point out to you Article 1. "Pursuant to the orders of the War Department, the guard forces at this plant were activated as Auxiliary Military

Police, and for military purposes will be commanded, drilled, and instructed as military units."

A. That is right.

Q. Item 2, "All members of the guard force are subject to the Articles of War and may be court-martialed or otherwise punished for violations thereof." Is that right?

A. Yes, sir.

Q. And I read Article 4: "The mission of this guard force is to provide protection for this plant. In addition to its normal functions; the force or any member thereof, whether on or off duty, is available for military use in any emergency, whether it be the result of flood, fire, or other disaster; internal disorders hazardous to the plant property or its production; or enemy action of any nature. *No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission.*" I ask you whether that italicized sentence, the last sentence I read, is one which is emphasized in the training and
123 instruction which is accorded to the Military Police?

A. Yes, sir.

Mr. PANTZER. I now offer Employer's Exhibits No. 10, 11, and 12 in evidence.

Trial Examiner SHROYER. Is there any objection? If not, they may be admitted.

(Whereupon, the documents heretofore marked for identification as "Employer's Exhibits 10, 11, and 12" were received in evidence.)

By Mr. PANTZER:

Q. Are you familiar with the Manual of Interior Guard Duty?

A. Yes, sir; I am.

Q. I show you Field Manual 20–100, issued by the War Department, which is called The Basic Field Manual or the Soldier's Handbook, edition of July 23, 1941, and ask you to look at Page 136 and 137 thereof.

A. Yes, sir.

Q. I now show you Employer's Exhibit No. 13 and ask you whether that is a photostatic copy of the face of that basic field manual.

A. Yes, sir.

Q. And Pages 136 and 137?

A. Yes, sir; that's it.

Mr. PANTZER. The Employer now offers Employer's Exhibit No. 13 in evidence.

124 (Whereupon, the document heretofore marked for identification as "Employer's Exhibit No. 13" was received in evidence.)

By Mr. PANTZER:

Q. Calling your attention to the almost identical wording of the General Orders of the Military Guard in active military duty and the Auxiliary Military Policemen, as set forth in Employer's Exhibit No. 11——

Trial Examiner SHROYER: Any objections? No objection. It was admitted.

By Mr. PANTZER:

Q. Referring to Employer's Exhibit No. 11, I call your attention to the third General Order "to report all violations of orders I am instructed to enforce."

A. That's right.

Q. To whom do you report such violations? What do you do under that order?

A. I would report any violation, any serious violation, to Capt. Wetenhall of Cincinnati.

Q. And who instructs you to enforce orders?

A. It would be the government.

Q. Do you take any orders from Mr. Wood who sits here in the court-room and is the personnel director of E. C. Atkins and Company?

A. Yes, naturally; I work very closely with Mr. Wood, as he is personnel director of the plant and there can be much more efficient guarding of the plant and operation of the plant if
125 we do work closely. I have never taken an order as such from him.

Q. You try to cooperate?

A. I try to cooperate to the best of my ability and he does the same for me.

Q. I note that Order No. 10 directs you to salute all officers and all colors and standards not cased. Is it customary for the Military Police to salute the officers of the Army and Navy?

A. Yes, sir. One of our men got a pretty stiff bawling out for failure to do that several months ago and embarrassed me very much.

Q. From whom?

A. Capt. Wetenhall of the army.

Q. He exacts that salute from the men?

A. Yes, sir. And returns it when he receives it.

Q. Is Capt. Wetenhall a regular army man?

A. Yes.

Q. Of the corps of Military Police?

A. Yes, sir.

Q. And CMP stands for Corps Military Police?

A. Yes, sir; it does.

Q. I now show you Employer's Exhibits 14, 15, and 16 and ask you what, if anything, an Auxiliary Military Police stationed at either of the Atkins plants would have to do with those
126 three kinds of cards. The first card is number what?

(Whereupon, the documents above referred to were marked for identification "Employer's Exhibits 14, 15, and 16.")

A. Exhibit No. 14, that's a plain, blank for a picture pass and now used in the Armor Plate Division only. A man cannot come in that particular gate and go to work in that building without showing one of these to the guard on duty. That used to be used over the entire plant, the same blank. But the badges have been finished for the Saw Division and the badge supplanted this card here for the Saw Division, but is still in effect for the Armor Plate Division.

Q. By badge, you mean the celluloid badge about 2" in diameter with the employee's picture on it?

A. Yes.

Q. Are those badges worn by the production and Maintenance employees?

A. Yes, sir; they are.

Q. Are those badges worn by the Auxiliary Military Police?

A. No, sir; they are not.

Q. The Auxiliary Military Police wear an emblem on the arm; is that right?

A. Yes, sir.

Q. Which says "Auxiliary Military Police"—on the left arm?

127 Q. The regulation relating to Military Police being the directive that is in evidence; namely, Exhibit 4, is the one that sets forth the way in which those badges are to be worn. Proceed now and tell me what Employer's Exhibit No. 15 is?

A. Exhibit No. 15 is the red pass which passes an employee of the company who is already in the grounds into the Armor Plate Division. For instance a man may be on maintenance work and not be attached to that department but he may have to go in there on business. When that happens, the company issues him the red pass which allows him to go in there and take care of whatever business he has but he cannot go in without showing this red pass to the guard on duty at the door of that particular building. That's Exhibit 15.

Q. What is Employer's Exhibit No. 16?

A. Exhibit 16 is a blank which has two uses: (1) One use of which is when it is used as a gate pass which is good to go in and out of the gate at any time during working hours. It is known as a gate pass. It is not issued to anyone going in unless his business in going in and out of the plant necessitates him having it. For instance, an executive of the plant that goes in and out six or eight times a day does so when he is working, so he would have to have one of these to get in and out of the plant. It is used again—the blank is used with different wording typed in
128 as a temporary gate pass to allow a new employee to go to work who has not yet received his regular picture pass or picture badge. In other words, the same blank is used for two different types of passes with different wording thereon. That is Exhibit 16.

Q. Do you know whether or not the Military Police have any grievance procedure such as unions have?

A. Do you mean within the group?

Q. Yes; suppose that someone disciplines one of the men. What recourse does that man have?

A. He has no recourse at all.

Q. Do the members of the Military Police have seniority rights?

A. No, sir.

Q. What is the fact on that case?

A. Well——

Trial examiner SHROYER. In regard to lay offs?

By Mr. PANTZER:

Q. With respect to lay offs, promotions, and so forth?

A. Of course, we haven't had any lay offs but there naturally would be no seniority, entering that I would not think. But in the matter of promotions, efficiency and ability is the only factor that governs. We have men working with us that have been there
129 lots longer than any of our lieutenants at the present time, but the lieutenants who are there, the last three lieutenants that are promoted, but the three lieutenants are not in any respect the oldest guards in the point of seniority. They happen to have been of extra ability, judgment, other qualities.

Q. Upon being promoted to lieutenant, do they obtain greater pay?

A. Yes, sir.

Q. The question of their length of service would be at the Atkins plant and is no criterion whatever?

A. Wouldn't be accepted in the slightest regard; no, sir.

Q. Now, Mr. Gann, when he was on the stand, referred to general orders which, I take it, are Employers Exhibits 10, 11, and 12 that I entered into evidence while you were on the stand,

Mr. Witness, and also two special orders. What are the special orders?

A. Well, the best way I can describe a special order—most special orders would come from myself.

Q. Are they verbal or written?

A. Well, they are both. Small special orders, nevertheless important enough to be adhered to would be verbal, but a special order which would be a little more complicated or something of that nature would be written down and nailed on the bulletin board in the guards' room and they would read it and follow it.

Q. Do any of the Military Police under your command
130 take any orders from any officer, director, or agent of the Atkins company as such?

A. No; they wouldn't take any orders. Just like myself, they would cooperate in any way they could, but they would only——

Q. Suppose such cooperation involved deviation from such specific order which you had to give. Would they follow your specific order or would they cooperate?

A. They would—that would be their orders—to follow mine; yes, sir.

Q. You would have the same reaction towards such request of cooperation as you would if you had a specific order or a general order to the contrary from one of these superiors, is that right?

A. Yes, sir. In those orders, it says, "No conflicting interest." It means a little different thing there but it means a lot besides. You would follow your Governmental orders first. They would have a much higher priority.

Q. Do you, when you first go on duty, have a formation of any kind, an inspection, a roll call?

A. Not a formal one; no, sir. It would be most informal in our plant. With just nine men you can see who is there at a glance. You wouldn't have to call roll. Inspection is just as quickly done.

Q. Are those guards, when they perform their duty, armed?

131 A. Yes, sir.

Q. With what weapon?

A. With a revolver.

Q. State whether or not the shifts of your guard at your plant rotate or whether they are always the same?

A. The shifts rotate every two weeks.

Q. What do you mean by rotate?

A. I mean that there is entirely—it is my idea, but it seemed a fair way to run it for our particular plant, that they all trade hours every so often and give each other an even break on it, so the 8–4 shift will work from eight until four in the day time for

two weeks and then on a Sunday morning, starting at 8 o'clock in the morning, that shift of men will by and large gravitate to the 12–8 shift, upon which they will stay for two weeks, and on completion of that two weeks, they will revert back to the 4–12 shift, that is the idea, although we don't always go to the letter on that.

Q. That is your idea, is it?

A. Yes, sir; that is my idea.

Q. State whether or not the shifts of the regular production and maintenance employees at the main plant of the Atkins company rotate?

A. No, sir; they don't rotate at all. They are frozen shifts.

132 Q. What you are doing is directly the opposite of what Mr. Wood in the Personnel Department does with the remaining production employees?

A. Yes, sir.

Q. Will you now kindly tell us a little bit more about the kind of instruction which you and your men under your command have received from the Military Police and where that instruction was imparted?

A. Once a week on a Monday at the Ipaco on 16th and Alabama Street, we get one hour of instruction at the hands of the United States Army Corps of Military Police. That instruction is taught by a second lieutenant of the Military Police, under the direction of Capt. Wetenhall and his superior, Col. Rasmussen of the Continuous Superior District and subjects taken up are Military Police subjects only and attendant subjects. For instance, we have had a lot of instruction on judo, which is the art of self-defense. We have had instruction on the use of clubs and fists. We have had guiding law of instruction on pistol marksmanship and the general handling and care of them. We have had instruction on military courtesy by training films, methods of arrest by training films, and of disarmament of persons by training films, which are the property of the army and borrowed from the fort at Ft. Harrison

133 in the state here and returned by the lieutenant. They used sighting bars which are the property of Ft. Harrison showing the men how to sight their pieces (hold revolvers) for accuracy, and also there are other subjects such as fire control and prevention. That will give you a general idea. Some of the other subjects I can't recall just now. All Military Police subjects, every one of them. We have also had close order drill, regular army close order drill on the floor, administered by the lieutenant and his assistants in which we all took part.

Q. What are your hours of work?

A. My own hours?

Q. Yes.

A. I work whenever I think—I work whatever hours I think are advisable to work. They are very scattered and go all around the clock.

Q. You are paid overtime after eight hours in one day?

A. No, sir. I work on a straight salary basis. There is no cognizance at all taken of that when there are any extra hours.

Q. Do you on the average work more than eight hours a day?

A. Well——

Q. How much more?

A. Oh, on an average week after week, it might be ten hours—on an average week after week. Sometimes I work as high as sixteen and twenty and twenty-two, depending on
134 the day and time and circumstances.

Q. But that is left to your own initiative as a military officer?

A. Yes, sir.

Q. Subject nevertheless to any orders you may get from higher authority?

A. Yes, sir.

Q. Do you recognize any of the officials of the plant, as such higher authority? By that, I mean of the company?

A. Not as authority, only that I am hired by the company to afford them protection and that means protection personally as well as protection for the property around them. Naturally they, the officers of the company, are very valuable property. I would regard them as the most valuable property we have to protect, but not as superiors. Anything we guards do—I might explain it in this way—if you look on the bottom of the large letter, you will see at the bottom the motto of the Auxiliary Military Police, "Production must not be interrupted." That is the rule by which we live. Anything that would tend to interrupt production, whether it would be tampering with machinery or personnel or anything else.

Q. What would you do if you found Mr. Wood tampering with machinery or personnel or committing sabotage?

A. Well, in a case like that, I would just turn him in,
135 like anybody else. I would arrest him and turn him in because I am sworn to do that. I have sworn an oath.

Q. Would you do the same with the president of the company?

A. Yes, sir; I would.

Q. And you own no responsibility to the president or any director of the company which would make you violate your oath to the Military?

A. No, sir; there is no reason for that.

Q. You have stated that your pay is on a weekly basis?

A. Yes, sir.

Q. And that consequently you get no overtime for any special services?

A. No, sir.

Q. In that respect you are like a soldier paid on a monthly basis?

A. Yes, sir.

Q. Officer paid on a monthly basis?

A. Yes, sir.

Mr. PANTZER. I think that is all.

Trial Examiner SHROYER. I don't know whether we had 14, 15, and 16 admitted?

Mr. PANTZER. I beg your pardon. I wish to offer 14, 15, and 16.

Trial Examiner SHROYER. Any objection? If not, they are admitted.

136 (Whereupon, the documents heretofore marked for identification as "Employer's Exhibits No. 14, 15, and 16" were received in evidence.)

Trial Examiner SHROYER. Any questions?

Mr. RICHARDSON. Yes.

Cross examination by Mr. RICHARDSON:

Q. You are the Chief of the Guards?

A. Yes, sir; I am.

Q. In other words, all guards come under your direction?

A. Yes, sir.

Q. You have the right to give them orders? You do give them orders, don't you?

A. Yes, sir; I do.

Q. Do you have the right to recommend them for promotion or discharge? Do you do that?

A. I recommend a man for discharge but I don't discharge him myself.

Q. You have the right to recommend him for discharge?

A. Yes, sir.

Trial Examiner SHROYER. While on the subject, to whom do you recommend?

The WITNESS. To Capt. Wetenhall, Cincinnati, who does the discharging.

Trial Examiner SHROYER. Who issues these two different types of terminations?

137 The WITNESS. He does; he issues those.

Trial Examiner SHROYER. Pardon me.

Mr. RICHARDSON. That's all right.

By Mr. RICHARDSON:

Q. Suppose Mr. Atkins came out and gave you an order. Would you obey that?

A. I never got an order.

Q. If you did, would you obey that order?

A. Well, I wouldn't consider it an order, in the first place. If I could oblige him in any way, without violating federal orders, I would do my best to cooperate with him, but I wouldn't have an order from him in the first place.

Q. Are you paid by check?

A. Yes, sir.

Q. Who signs the check?

A. E. C. Atkins and Company.

Q. What do you mean you are hired by the Government when E. C. Atkins and Company pays you?

A. They pay because the Government makes them pay me.

Q. Have you got any commission in the army?

A. No; not with the Government.

Mr. RICHARDSON. That's all.

By Trial Examiner SHROYER:

Q. These four lieutenants—who made them lieutenants?

138 A. I made three of them myself. One of them was a lieutenant when I came there. He is a very fine man. His work has been satisfactory and I saw no reason to change it.

Q. Whom did you confer with?

A. No one.

Q. You have final authority to do that?

A. Yes, sir.

Q. Without going either through the personnel office or through the Auxiliary Military Police departments?

A. The only thing I did was after I had decided who would be the next lieutenant and furthered that man, made him a lieutenant, myself, in my office, gave him his gold badge and his authority and posted the notice that he was a lieutenant, and then I went to Personnel and advised them that he was the new lieutenant.

Q. He got his increase in pay?

A. Yes.

Q. Who made you the Chief?

A. I don't know. I was hired just like a regular guard with the idea that I would be Chief after a certain length of time, I became Chief at the Okey of the army and the company.

Q. You are hired at the personnel office to be Chief subject to the approval of the Government?

139 A. Yes, sir. And of course I am inspected by the army and if they don't like me as being Chief, they can "unchief" me very fast.

Q. Are all your guards militarized?

A. All but two or three that are brand new men and will be in a week or so.

Trial Examiner SHROYER. That's all.

Redirect examination by Mr. PANTZER:

Q. In connection with your administrative duties, do you carry on any correspondence with Mr. Wood or any officials of the plant?

A. No, sir.

Q. Do you carry on any correspondence with the Cincinnati office of the Military Police?

A. Yes, sir.

Q. With Captain Wetenhall?

A. Wetenhall's office.

Q. Do you have before you there the file of that correspondence?

A. Yes, sir; I think it is here.

Q. And that file is about one inch thick now?

A. Yes, sir.

Q. And contains onion skin carbon copies of your letters to Wetenhall and original letters from Wetenhall to you?

A. That's right.

Q. About how often do you write him affecting your
140 duties, responsibilities, and requests for instructions from him?

A. On an average probably of twice a week, is all.

Q. You ask him both for general orders and for specific instructions?

A. Yes; or I might on a small case instead of writing Capt. Wetenhall, I might talk it over with his assistant, Lt. Scanlon in the City of Indianapolis, who lives here.

Q. That wouldn't require correspondence?

A. No.

Q. You could conduct by telephone, too?

A. Yes.

Q. Will you glance through that file and let us know what type of questions you have on occasion taken up with Capt. Wetenhall?

A. Most of these are about men being discharged or hired.

Q. With respect to hiring and discharging?

A. Yes. Asking him for passes to be sent to me that I can have the finger prints and the facts printed in and things of that nature. Do you want me to read one of these letters?

Q. Yes, if you have a characteristic letter.

A. "Continuous Security District, P. O. Box 1750, Cincinnati,
Ohio. Attention: Capt. Wetenhall. Gentlemen: Attached you will find two guards' passes of which the one on Carl Taber
141 is to be cancelled with an honorable discharge. You will

note on the second one, which is made out on Garnet J. Williams, that it has not been signed to you. Evidently that was overlooked, so I will appreciate it if you will sign Williams' pass and return it to me. Yours very truly, Henry A. Johnston, Chief of Guards, E. C. Atkins and Company."

Q. If a man is drunk on duty have you the right to discharge that man?

A. I couldn't discharge him legally; no, sir.

Q. Could you suspend him?

A. I would merely suspend him from duty as of the minute I saw him in that condition.

Q. What would be your next step?

A. To sit down and write Capt. Wetenhall a letter and I would recommend his discharge from the Military Police.

Q. Do you recommend discharge to Mr. Wood of the Personnel office?

A. I follow through on that so that the same record—the record will be set straight.

Q. Which one discharges?

A. The Government does the discharging from the Military Police.

Q. Mr. Wood couldn't discharge the man, could he, under these regulations?

A. Not under those regulations.

142 Mr. PANTZER. That is all.

Trial Examiner SHROYER. Any further questions?

Mr. RICHARDSON. No.

Trial Examiner SHROYER. That's all. We will take a five-minute recess.

(Witness excused.)

(Whereupon a five-minute recess was taken.)

CYRUS E. WOOD called as a witness by and on behalf of E. C. Atkins and Company, being first duly sworn, was examined and testified as follows:

Trial Examiner SHROYER. Give your name and address to the reporter.

A. Cyrus E. Wood; 634 West Maple Road, Indianapolis, Indiana.

Direct examination by Mr. PANTZER:

Q. State, Mr. Wood, what your relation is to E. C. Atkins and Company, the employer in this case.

A. Personnel Director for the various plants of E. C. Atkins.

Q. How long have you been employed by the Atkins company?

A. 37 years this fall.

Q. How long have you been Personnel Director?

A. Seven years, actual. Previous to that time, about five years, I was known as Force Director, which eventually developed to the personnel work.

143 Q. You have been in actually?

A. Have since 1937.

Q. About the time that the CIO organized the production workers, exclusive of saw smiths?

A. That's right.

Q. What two unions do you have at your plant?

A. We have the saw smiths local union affiliated with A. F. of L. and U. S. A. Local affiliated with United States Saw Smith Workers of America.

Q. I am going to refer to them as the Saw Smiths' local and the CIO. How many employees have you in the Saw Smiths' local at the present time?

A. 59.

Q. Now there are 59 saw smiths; is that right?

A. That's right.

Q. Do the apprentices to saw smiths attain active membership in the Saw Smiths' local?

A. No.

Q. Do the brake press operators, which in a sense, do some of the work that the saw smiths do, attain active membership in that local?

A. No, sir.

Q. But neither the apprentices to saw smith nor the brake press operators are members of the CIO?

144 A. That's right.

Q. How many of your employees are members of the CIO?

A. As near as I can tell you now, about 1,208.

Q. How many of your employees at the main plant are plant guards or Auxiliary Military Police?

A. Thirty-two.

Q. When you say your employees, they are your employees only in the sense that you pay their wages; is that right?

A. That is correct.

Q. And you make the necessary pay-roll deductions?

A. That's right.

Q. How many of those Auxiliary Military Police are stationed at the Fall Creek Ordnance Plant?

A. Thirty.

Q. Now then, have you mentioned now all the persons, the individuals, who are occupied either in production work or as Auxiliary Military Police at both those plants?

A. That is correct.

Q. Is the Saw Smiths' Union a closed shop?

A. Yes; it is.

Q. Is the CIO a closed-shop union?

A. It's a union shop.

Q. And substantially all the production workers do belong to that?

A. That's correct.

145 Q. All of them?

A. Yes.

Q. Now then, state who is the owner of the plant and improvements at your main plant?

A. E. C. Atkins and Company.

Q. Who is the owner of the land, improvements, machinery, and fixtures at the Fall Creek Ordnance plant?

A. The United States Government.

Q. State in what capacity E. C. Atkins and Company operates that plant?

A. The plant is operated upon a lease.

Q. Lease from the Federal Government?

A. That's correct.

Q. And the terms and conditions of that lease are confidential for military reasons?

A. That is correct.

Q. So that it would be a breach of military confidence to introduce that lease in evidence?

A. That's right.

Mr. PANTZER. We beg, therefore, Mr. Examiner, to be relieved of what would be by me the obligation of producing that lease in evidence and advising what its terms are.

Trial Examiner SHROYER. Surely.

By Mr. PANTZER:

Q. Is the Fall Creek Ordnance Plant treated by the E. C.

146 Atkins company in the light of a military reserve?

A. It is.

Q. And is it so treated by the military authorities?

A. It is.

Q. That is not the case with the main plant on Illinois Street?

A. No, sir.

Q. That is a plant which belongs to the Atkins company?

A. That is right. It is listed, however, as a restricted area under government supervision.

Q. I now show you Employer's Exhibit No. 17 and ask you whether that is a photostatic copy of the existing contract between E. C. Atkins and Company and the CIO Local?

(Whereupon, the document above referred to was marked for identification as "Employer's Exhibit No. 17.")

A. This is a contract that is now in force; yes.

Mr. PANTZER. I offer Employer's Exhibit No. 17 in evidence.

Trial Examiner SHROYER. Is there any objection?

Mr RICHARDSON. No.

Trial Examiner SHROYER. There being no objection, it may be admitted.

(Whereupon, the document heretofore marked for identification as "Employer's Exhibit No. 17" was received in evidence.)

147 Q. I show you Employer's Exhibits No. 18, 19, and 20 and ask you what they are?

(Whereupon, the documents above referred to were marked for identification as "Employer's Exhibits No. 18, 19, and 20.")

A. *Exhibit No. 18 is our original agreement negotiated as of July 1940* with the Saw Smiths' Local Union No. 18548, affiliated with the A. F. of L. Exhibit No. 19 is an addendum to the original agreement of July 1940, entered into between the Saw Smiths' Union and E. C Atkins and Company to allow the use of other than anvil men on brake presses to straighten armor plate to expedite production of government orders. No. 20 is an addendum that was drawn up at the time of the discussion in regards to the use of brake press operators and shows a period of time over which an experiment was carried out to see whether we could produce the required amount of armor plate without the addition of brake press operators.

Trial Examiner SHROYER. May I ask if the company has any quarrel with the inclusion of the two plants by the union in one unit or whether or not it all goes to the main shop?

Mr. PANTZER. It all goes to the main shops. I want to say this in answer to your question; that at a representation hearing at which both the CIO Local and the Saw Smiths' Local were

148 parties and represented, held in January 1 hearing, lasting for four days, the company took the position that the employees of both the main plant and the Fall Creek Ordnance Plant belong to one bargaining unit, a position which was sustained by the Board.

Trial Examiner SHROYER. And the contracts so written?

Mr. PANTZER. The contracts were so written. It would be out position that if the employer is wrong on its main contention, that the National Labor Relations Board does not provide for bargaining between what you might call almost an independent contractor and a labor union, that the employees of both plants belong to one bargaining union. I understand that was also Mr. Richardson's position taken in the very amicable conference we had be-

fore Mr. Getreu, the field examiner at the Indianapolis office. That is right, Mr. Richardson?

Mr. RICHARDSON. That is right.

Trial Examiner SHROYER. I didn't want to interrupt you.

Mr. PANTZER. I surely think we should get it in the record.

Trial Examiner SHROYER. Thank you.

Mr. PANTZER. I offer Employer's Exhibits No. 18, 19, and 20.

Trial Examiner SHROYER. If there s no objection, they may be admitted into evidence as as Exhibits No. 18, 19, and 20.

149 (Whereupon, the documents heretofore marked for identification as "Employer's Exhibits No. 18, 19, and 20" were received in evidence.)

By Mr. PANTZER:

Q. Your relationships with the Saw Smiths' Union so far as it has been reduced to writing, is evidenced by these three documents, No. 18, 19, and 20?

A. That is correct.

Q. Before the Atkins company became engaged in defense work, will you kindly state how many watchmen were employed as employees by the Atkins company?

A. It varied from four to six. We had two night watchmen on patrol called clock men—made the rounds regularly through the plant and pulled the 82 boxes. The night clocks.

Q. You had four day men?

A. No; two day men at the gates. Frankly, they were, at that time that was a pensioner's job.

Q. You now have a total of Auxiliary Military Police of how many at both plants?

A. Sixty-four.

Q. This increase in the staff required to guard and protect the plant has been occasioned by the participation of the Atkins company in the war effort and the insistence of the Military that the plant be adequately protected against sabotage and similar happenings, is that right?

A. At the beginning of our participation in the produc-

159 tion of war materials; namely, armor plate, representatives from the Cincinnati office came into our plant and made a survey and gave us a recommendation of the requirements of the Government insofar as plant production would be considered and that was submitted in writing and complied with.

Q. When you say the Cincinnati office, you mean the Cincinnati Ordnance Office?

A. Ordnance Office.

Q. Are most of your contracts with the Ordnance Department?

A. We have had dealings in the past and have complied with the recommendations of both the army and navy. The major part of our control was of the army and at this time is practically all controlled by army interests.

Q. Was it the Ordnance Department that insisted upon your switching over from a watchman basis to an Auxiliary Military Police basis or was it the Military Police?

A. It was the army representatives from the Ordnance Department of Cincinnati, out of Col. Rasmussen's office that required it.

Q. As a result of that insistence the Auxiliary Military Police were employed?

A. That is correct.

Q. State whether or not, Mr. Witness, the Atkins company could retain any of its war contracts if it did not submit to
151 the system of Auxiliary Military Police that is now in force at the plants?

A. It is understood and the majority of contracts submitted, you will find the clause stating that unless proper protection of Government property is provided in compliance with certain directives, that will be issued from time to time, some of these special contracts will be or might be cancelled and fact of the matter is would be if we did not comply with the interests.

Q. You have heard the testimony of Chief Johnston on the stand with respect to the right of E. C. Atkins and Company to hire or discharge Military Police, is that right?

A. That's right.

Q. Is his testimony with respect to that correct?

A. It is correct.

Q. Is his testimony with respect to your being permitted to make recommendations but not being permitted to give orders respecting the duties of the Auxiliary Military Police correct?

A. It is correct.

Q. You have been able to work in cooperation with the Auxiliary Military Police?

A. We have; yes.

Q. Have you ever attempted to exercise any of the authority which you are prohibited from exercising by
152 military orders over any of these sixty-four members of the Military Police?

A. Not to my knowledge.

Q. Or has any foreman or hiring officer or director of Atkins and Company attempted to exercise such a right?

A. No.

Q. Instructions have been promulgated, have they not, throughout the entire plant that the Miliary Police are the business and affairs of the military authorities?

A. That's correct. It is understood, sir.

Q. Those two sets of contracts that I gave you provide for seniority in the case of your regular production-maintenance employees, do they not?

A. That's correct.

Q. And are those rules respecting seniority enforced as to those employees?

A. Oh, yes.

Q. Are they enforced by you with respect to the Auxiliary Military Police?

A. No.

Q. Does the same apply with respect to grievance procedure? In other words, the grievance procedure is not a part of the discipline of the Auxiliary Military Police? They have their own discipline?

A. That's right.

153 Q. What would you do, Mr. Witness, if one of the Auxiliary Military Police came to you and protested to any action of a disciplinary nature by Chief Johnston?

A. Report that to the proper authorities, in this case to Col. Rasmussen in Cincinnati. He is the man that my office deals with when necessary.

Q. You would take no jurisdiction yourself?

A. No; not without instructions from Col. Rasmussen.

Q. You do, whenever matters of discipline are taken up in your plant get confirmation of any instructions which Col. Rasmussen or Capt. Wetenhall sent to Chief Johnston or to Chief Hann, is that right?

A. That's right.

Q. Do you give any military instructions to your regular employees at the Atkins company?

A. No.

Q. Are they required to salute?

A. No, sir.

Q. Who has the right to discharge the employees?

A. Plant employees?

Q. Plant employees.

A. I do.

Q. You and the foremen?

A. The foremen can recommend the discharge. The actual discharge has to take place through the general superin-

154 tendent or myself.

Q. In the CIO contract?

A. Yes, sir. That's right.

Q. I ask you whether anyone other than Auxiliary Military Police down at your plant is entitled to carry an identification card such as is set forth on Employer's Exhibit No. 3?

A. No, only the Auxiliary Military Police are issued these cards.

Q. Are they issued by your office?

A. They are not. They are issued by the Cincinnati office.

Q. With respect to the production employees and the officers, directors and other agents of E. C. Atkins and Company, what kind of an identification card is issued?

A. We have small cards, a card that was early requested by the Ordnance Division to carry a man's photograph, his thumb prints, and a description, a general description.

Q. I show you Employer's Exhibit No. 21 and ask you whether that is a photostatic enlargement of this, your own card?

A. That is correct.

(Whereupon, the document above referred to was marked for identification as "Employer's Exhibit No. 21.")

Mr. PANTZER. I offer Employer's Exhibit No. 21 in evidence.

Trial Examiner SHROYER. If there is no objection, it
155 may be admitted.

(Whereupon, the document heretofore marked for identification as "Employer's Exhibit 21." was received in evidence.)

By Mr. PANTZER:

Q. In addition to the identification card, Employer's Exhibit No. 21, do you and all the other officers, directors and production and maintenance employees of the Atkins company wear identification badges?

A. We do.

Q. About 2 inches in diameter with your photograph on them?

A. 2 inches in diameter at the South Street plant and 1½ inches in diameter in the Fall Creek.

Q. Do the Auxiliary Military Police wear such identification badges?

A. They do not.

Q. When a person applies for employment as an Auxiliary Military Policeman, where does he fill out the application from which Employer's Exhibit No. 5 is taken? Is that done in your office?

A. Yes, sir.

Q. Your office both in the main plant and the Fall Creek plant?

A. Yes.

Q. Do you have the authority to accept that application for the military authorities?

A. I can accept that only subject to the approval or
156 disapproval of the Cincinnati office. We select or rather we interview and select prospective guards. Those men are in turn, their names are submitted to the Cincinnati office along with the proper papers that are provided by the Government for them to fill out. By their approval they are permanently inducted into the Military Police group, or upon their rejection, they would be given their dismissal papers.

Q. When you say you select them, as a matter of fact, all you do is just to recommend the man to them?

A. I interview, but recommend them.

Q. When they have been recommended, do you know whether or not the military authorities make an independent investigation as to the capacity, integrity, and patriotism of the man whom you have recommended?

A. In the past two years, it has come to my attention, for no statement has been made, that they do, but the report has come back which made it necessary to remove a man on the force.

Q. Is that so that you are satisfied that an independent investigation is made?

A. That's correct.

Q. In addition to what you have learned in the court room today from Chief Johnston?

A. Yes.

Q. When a badge and identification ticket are issued to
157 new employee in your Production Department, state whether or not the applicant is registered with the Federal Bureau of Investigation and the Indianapolis Police Department?

A. That is correct.

Q. Is that then done in the case of Auxiliary Military Police?

A. That's right.

Q. That is done with respect to both of them?

A. That's right.

Q. I now show you Employer's Exhibits No. 22 and 23, and ask you whether they are copies of such records?

A. These are copies of the forms filled out for the Federal Bureau of Investigation and for the local police departments, Subversive Division, Indianapolis Police Department.

Trial Examiner SHROYER. They may be received in evidence.

(Whereupon, the documents heretofore marked for identification as "Employer's Exhibits No. 22 and 23" were received in evidence.)

Mr. PANTZER. That's all.

Trial Examiner SHROYER. Any further questions?

Mr. RICHARDSON. Yes.

Cross-examination by Mr. RICHARDSON:

Q. Mr. Wood, when employers on the guard force are hired, who sets the rate of pay?

A. The rate of pay was established when we filed our
158 schedule October 3, 1942, with the Wage and Hour Division.

Q. The company set that rate of pay at that time?

A: That's right.

MR. RICHARDSON. That's all.

Trial Examiner SHROYER. Have you any further questions? I have none. Thank you very much.

(Witness excused.)

MR. WOODS. I have another job. May I be excused?

Trial Examiner SHROYER. Yes.

MR. PANTZER. The employer rests.

Trial Examiner SHROYER. Do you think, Mr. Pantzer, can you tell me whether or not there is any unusual degree of expansion in this guard unit as contemplated at any time within the next month?

MR. PANTZER. No; I would say not.

Trial Examiner SHROYER. Do either of the parties wish any oral argument at this time?

MR. PANTZER. We would like to file a brief.

Trial Examiner SHROYER. What about you, Mr. Richardson?

MR. RICHARDSON. I was in hope it would be settled here now. I would be willing to let the case rest in the hands of the Board.

Trial Examiner SHROYER. You do not intend to file a brief?

MR. RICHARDSON. No.

159 Trial Examiner SHROYER. The present rules, Mr. Pantzer, are that you have seven days in which to file a brief.

MR. PANTZER. Seven days from today?

Trial Examiner SHROYER. That is right.

I believe you also stated at the beginning of the hearing that you wish to renew your motion to dismiss at this time? Do you care to make any additional statement?

MR. PANTZER. No. May I just by so saying renew that motion without repeating the language—the motion to dismiss which I made at the beginning of the hearing?

Trial Examiner SHROYER. I will allow that and I will refer the motion to the Board.

Is there anything further coming before the Trial Examiner? If there is nothing further, the hearing is closed.

(Whereupon at 5:00 p m., the hearing was closed.)

161 *Board's Exhibit 1–A*

United States of America

Before the National Labor Relations Board

Ninth Region

Case No. 9–R–1200

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90 AND THEIR AFFILIATE, LOCAL 1683, PETITIONER

NOTICE OF HEARING

The Petitioner, above named, having heretofore filed with the National Labor Relations Board, Ninth Region, a Petition for Investigation and Certification of Representatives, pursuant to Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, copy of which Petition is hereto attached, and it appearing to the National Labor Relations Board that a question affecting commerce has arisen concerning the representation of employees described by such Petition,

You are hereby notified that pursuant to Section 9 (c) of the Act, on the 24th day of September 1943, at 10:00 o'clock in the forenoon, Central War Time, in Room 247, Federal Building, Indianapolis, Indiana, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board upon the question of representation affecting commerce which has arisen, at which time and place the parties, above named, will have the right to appear in person, or otherwise, and give testimony, and persons or labor organizations desiring to intervene and to participate in the proceeding may petition for leave to do so in accordance with Article III, Section 5, and Article II, Section 19, of the Board's Rules and Regulations.

In witness whereof, the National Labor Relations Board has caused this, its Notice of Hearing, to be signed by the Acting Regional Director for the Ninth Region on this 16th day of September 1943.

[SEAL]

Rosemary S. Macke,
ROSEMARY S. MACKE,
Acting Regional Director,
Ninth Region, National Labor Relations Board.

162

United States of America
Before the National Labor Relations Board
Ninth Region

Case No. 9–R–1200

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90 AND THEIR AFFILIATE LOCAL 1683

FIRST AMENDED PETITION FOR INVESTIGATION AND CERTIFICATION OF REPRESENTATIVES PURSUANT TO SECTION 9(C) OF THE NATIONAL LABOR RELATIONS ACT

1. Name of employer: E. C. Atkins and Company.
2. Address: 402 South Illinois Street, Indianapolis, Indiana.
3. General nature of business: Manufacture of war materials.
4. Description of the bargaining unit which petitioner claims is appropriate: All plant guards employed by the company at its two Indianapolis, Indiana plants (E. C. Atkins and Company and Fall Creek Ordnance Plant) excluding sergeants, lieutenants, captains, and chief.
5. Approximate number of employees in such unit: 64.
6. Approximate total number of employees in plant or plants involved: 2,000.
7. Number or percentage of employees in such unit who have designated or selected petitioner to be their representative for collective bargaining: 100%.
8. Who is the present bargaining representative of employees? None.
9. Names, addresses, and affiliation of any other known individuals or labor organizations who claim to represent any of the employees in such bargaining unit: None.
10. Is there an existing or recently expired contract and, if so, give expiration date? No.
11. The undersigned hereby alleges that a question has arisen concerning the representation of the employees in the above bargaining unit, in that the union notified the company on August 18, 1943, by letter, that they represented a majority of the employees in the above unit, and requested recognition as their collective bargaining agent. The company has not replied to this letter and in a joint conference between the parties held on September 10, stated that they did not feel that a unit of guards was appropriate.

The undersigned further alleges that said question concerning representation is a question affecting commerce within the meaning of said act.

The undersigned requests that pursuant to section 9 (*c*) of the National Labor Relations Act, the National Labor Relations Board investigate such controversy and certify to the parties the name or names of the representatives that have been designated or selected by said employees.

Name and address of employees or representatives filing the petition. (If made by a labor organization, give also the full name, local number and affiliation of the organization and the name and official position of the person acting for the organization.)

INTERNATIONAL ASSOCIATION OF MACHINISTS,
DISTRICT 90 AND THEIR AFFILIATE, LOCAL 1683.
By F. M. Richardson,
F. M. RICHARDSON,
Business Representative,
49½ South Delaware Street,
Indianapolis, Indiana. Market 8103.

Subscribed and sworn to before me this 10th day of September 1943 at Indianapolis, Indiana.

John C. Getreu,
JOHN C. GETREU,
Field Examiner, Ninth Region.

164 *Board's exhibit 1–B*

TRIAL EXAMINER'S STATEMENT IN "R" CASES

In relation to the Board's investigation concerning the selection of representatives for the purposes of collective bargaining in this case, it is desired at the outset to make clear the position of the trial examiner. The sole objective of the trial examiner here is to obtain a full and complete factual record upon which the Board itself may discharge its duties under Section 9 of the National Labor Relations Act.

It is the duty of the trial examiner to see that the record is full enough to contain all the material evidence but to limit the testimony and refuse to permit the introduction of evidence which is not material and relevant. His discretion is limited by this duty with which he is charged. Your attention should also be called to the fact that, in this type of case, as distinguished from a case where the employer is charged with the commission of unfair labor practices in violation of the Act, the trial examiner does not render an intermediate report to the parties. The case goes directly to the Board for decision.

In general, the trial examiner will present evidence bearing upon the question of the Board's jurisdiction over the parties and the

subject matter of the investigation, while the representatives of the other parties will be expected (with the assistance of the trial examiner if necessary) to present evidence upon the remaining issues. These issues include a description of the labor organizations involved, facts relating to the question concerning representation which is alleged to have arisen, the limits of the appropriate unit for collective bargaining, and the eligibility of employees for voting in any election which may be ordered. The services of the trial examiner are equally at the disposal of all parties to the proceeding in developing such material evidence.

More specifically the evidence should disclose, as to the labor organizations involved, their identity, time of formation, and general structure, including data as to eligibility of members, with particular reference to the employer here concerned. The nature of the question concerning representation should be shown by proof as to whether conflicting claims as to representation are being made, or whether the employer questions the representative status of any of the parties. Likewise the time when organization began, the department or group of employees affected, the subsequent growth or decline of membership, present claims as to membership, and relations had with the employer, including requests for collective bargaining and the presence or absence of contracts, are all of importance.

In considering the appropriate unit for purposes of collective bargaining, the proof should reveal the physicial properties involved, a break-down of the nature of work performed by employees as well as an analysis of the numbers of employees engaged in each type of work. The presence or absence of craft organizations should be established, as well as evidence submitted on the identity or differentiation of employees' problems as to wages, hours, or working conditions. The history of bargaining units in the plant or in the industry should be disclosed. Information is also desired as to the date as of which the payroll of eligible voters should be taken, for purposes of election or certification.

These suggestions are of necessity not all-inclusive. They may, however, serve to guide the parties to a full and complete factual presentation in which the trial examiner will, in an entirely neutral capacity, assist. The cooperation of all in order to get these facts as expeditiously as possible is required.

165 *Board's Exhibit 1–C*

United States of America

Before the National Labor Relations Board

Ninth Region

Case No. 9–R–1200

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90 AND THEIR AFFILIATE, LOCAL 1683

AFFIDAVIT AS TO SERVICE

STATE OF OHIO,
County of Hamilton, ss.

I, Helen M. Klensch, being duly sworn, deposes and say that I am an employee of the National Labor Relations Board, in the Ninth Region at Cincinnati, Ohio; on the 16th day of September 1943, I served by postpaid registered mail, bearing Government frank, a copy of Notice of Hearing, copy of Petition, and Trial Examiners' Statement, to the following named persons, addressed to them at the following addresses: E. C. Atkins and Company, 402 South Illinois Street, Indianapolis, Indiana; International Association of Machinists, District 90, and Local 1683, % Mr. F. M. Richardson, Bus. Rep., 491½ South Delaware Street, Indianapolis, Indiana.

HELEN M. KLENSCH.

Subscribed and sworn to before me this 18th day September 1943.

SYLVIA P. MAX,
Designated Agent,
N. L. R. B., Ninth Region.

166 *Board's Exhibit 2*

FH1–3 33 Govt. Ser. SEPTEMBER 22, 1943.

E. C. ATKINS AND CO.,
402 South Illinois Street, Indianapolis, Indiana.

KURT F. PANTZER, Esq.,
BARNES, HICKAM, PANTZER AND BOYD,
1313 Merchants Bank Bldg., Indianapolis, Ind.

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90, AND LOCAL 1683,
Care Mr. F. M. Richardson, bus. rep.
49½ South Delaware St., Indianapolis, Indiana.

Re E. C. Atkins and Co., Case No. 9–R–1200.

Please take notice that on request of respondent, hearing in this case postponed from 10:00 a. m. to 1:30 p. m. same date and place.

ROSEMARY S. MACKE,
Acting Regional Director,
National Labor Relations Board, Ninth Region.

9–R–1200 10:00 a. m. 1:30 p. m.

167 SEPTEMBER 22, 1943.

E. C. ATKINS AND CO.,
402 South Illinois St., Indianapolis, Indiana.

KURT F. PANTZER, Esq.,
Barnes, Hickam, Pantzer & Boyd,
1313 Merchants Bank Bldg., Indianapolis, Ind.

INTERNATIONAL ASSOCIATION OF MACHINISTS,
District 90 and Local 1683,
c/o Mr. F. M. Richardson, Bus. Rep.
49½ South Delaware St., Indianapolis, Indiana.

Re: E. C. Atkins Co., Case No. 9–R–1200

Please take notice that on request of respondent, hearing in this case postponed from 10:00 a. m. to 1:30 p. m., same date and place.

ROSEMARY S. MACKE,
Acting Regional Director,
National Labor Relations Board, Ninth Region.

168 *Board's Exhibit 3*

AUGUST 18, 1943.

MR. E. C. ATKINS,
President, E. C. Atkins & Company,
402 South Illinois Street, Indianapolis, Indiana.

DEAR MR. ATKINS: This will advise you that the Plant Protection employees, guards, of your company have selected District No. 90, and its affiliated Local Lodge 1683, as their collective bargaining agency exclusive of the chief of the force, office, production and maintenance employees, and plant supervision.

Therefore, we are prepared to furnish you with proof of this claim in any manner suitable to you.

Awaiting your reply, I remain,

Yours very truly,

FRANK RICHARDSON,
Business Representative, District No. 90.

R/as.
CC. Heisel.

169 *Board's Exhibit 4*

United States of America

Before the National Labor Relations Board

Third Region

Case No. 9–R–1200

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90, AND THEIR AFFILIATE, LOCAL 1683

STATEMENT OF FIELD EXAMINER CONCERNING CLAIMS OF AUTHORIZATION FOR THE PURPOSE OF REPRESENTATION

The undersigned, Field Examiner for the National Labor Relations Board, Ninth Region, has investigated the petition filed in the above entitled case.

In connection with the investigation petitioner has submitted to me certain evidence in support of its allegation that petitioner represents a majority of the employees in the alleged appropriate unit. This evidence consisted of 51 designations in the following form:

AUTHORIZATION FOR REPRESENTATION UNDER THE NATIONAL LABOR RELATIONS ACT

I, the undersigned employee of the _____
(Print full name of Company)
employed as _____
(Print your occupation or a description of your job)
at _____
(City) (State) (Location of Shop)
Home address _____

hereby authorize the International Association of Machinists, affiliated with the American Federation of Labor, to represent me and, in my behalf, to negotiate and conclude all agreements as to hours of labor, wages and other employment conditions in accordance with the provisions of the National Labor Relations Act of July 5, 1935.

The full power and authority to act for the undersigned as described herein supersedes any power or authority heretofore given to any person or organization to represent me, and shall remain in full force and effect for one year from date and thereafter, subject to thirty (30) days written notice of my desire to withdraw such power and authority to act for me in the matters referred to herein.

_____ _____
(Date) (Signature of employee)

_____
(Witness)

170 51 of the 51 signatures affixed to said designations appear to be genuine original signatures. 44 of the 51 signatures which appear to be genuine original signatures are the names of persons whose names are on the Company's pay roll of September 10, 1943, covering the alleged appropriate unit. The said pay roll contains the names of 63 persons within the alleged appropriate unit.

The designations containing apparently genuine signatures and bearing the names of persons appearing upon the Company's pay roll were dated as follows: 28, August 1943; 16, Undated; 44, Total.

Dated at Indianapolis, Indiana this 11th day of September 1943.

John C. Getreu,
JOHN C. GETREU,
Field Examiner, Ninth Region,
National Labor Relations Board.

171 *Respondent's Exhibit 1*

United States of America

Before the National Labor Relations Board

Ninth Region

Case No. 9–R–1200

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90 AND THEIR AFFILIATE, LOCAL 1683, PETITIONER.

APPLICATION FOR SUBPOENA DUCES TECUM DIRECTED AT F. M. RICHARDSON TO PRODUCE UNION RECORDS

Comes now E. C. Atkins and Company, one of the parties to this proceeding, and respectfully applies for a subpoena duces tecum directed at F. M. Richardson, Business Representative, International Association of Machinists, District 90, and their affiliate, Local 1683 (hereinafter referred to as the "Union"), one of the parties to this proceeding, to produce the following documents:

1. Charter, Constitution and Bylaws of the Union;

2. Minute book, membership roll, application cards, membership cards, dues books, bank book, check book, cancelled checks, correspondence and other records relating to the purposes,
172 activities and membership of said Union; in order that E. C. Atkins and Company may establish (a) the identity of the Union, within the purview of Section 2, subsection (5) of the National Labor Relations Act; (b) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chiefs," are "employees" within the purview of Section 2, subsection (3) of the National Labor Relations Act; (c) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chiefs," have "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection," within the purview of Section 7 of the National Labor Relations Act; (d) whether it is an unfair labor practice for E. C. Atkins and Company "to refuse to bargain collectively with the representatives of" all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," within the pur-

view of Section 8, subsection (5) of the National Labor
173 Relations Act; and (c) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," can properly be found to be a "unit appropriate for the purposes of collective bargaining," with in the purview of Section 9, subsection (b) of the National Labor Relations Act.

E. C. ATKINS AND COMPANY,
By KURT F. PANTZER,
Attorney.

174 *Respondent's Exhibit 2*

AGREEMENT BETWEEN THE UNITED STATES OF AMERICA

and

PLANT GUARD

In order that the existing military forces of the United States may be most effectively employed in combat activity against the enemies of the United States, the United States is approving the employment of certain guards as a civilian auxiliary to the military police for the purpose of guarding and protecting war material, war premises and war utilities from injury or destruction by the enemy or otherwise, including the making of arrests, as peace officers for violations of Federal laws, as well as for violations of orders and regulations issued by military authority. The United States requires that only persons physically fit, well trained in the use of arms and in the duties incident to their position, and of unquestionable loyalty to the United States be so employed.

Now, therefore, I, _____, who have been or am about to be employed by _____ as a guard at _____ for the purpose of guarding certain war material, war premises, and war utilities, in consideration of my employment or the continuation of my employment, do agree with the United States of America that:

(1) I will support and defend the Constitution of the United States against all enemies, foreign and domestic.

(2) I will bear true faith and allegiance to the Constitution of the United States.

(3) I will well and faithfully discharge my duty as a civilian auxiliary to the military police to protect war material, war premises, and war utilities against all enemies, foreign and domestic, and will obey any orders issued in connection therewith by the

President, as Commander-in-Chief of the Army and Navy of the United States, and by his duly authorized officers.

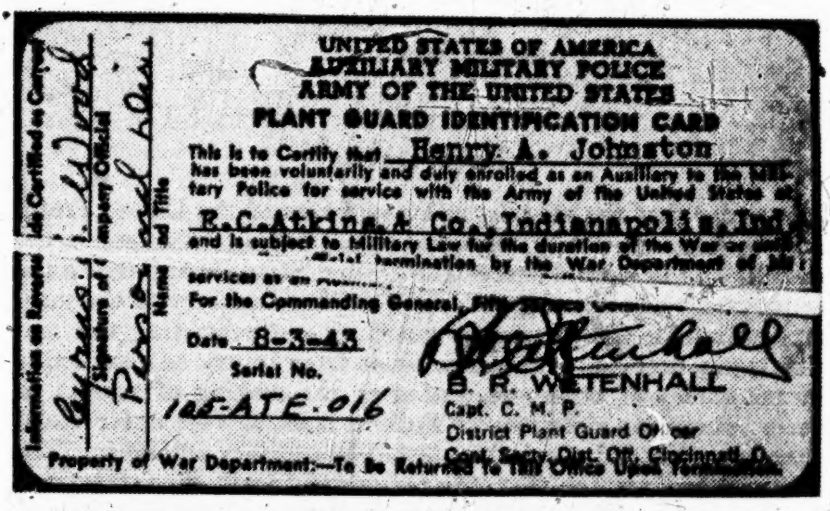
(4) I acknowledge that the appropriate Articles of War have been read and explained to me, and that in the performance of my duty to protect such war material, war premises, and war utilities, I am subject to military law during the period of my employment.

_____
(Signature)

_____
(Witness)

_____
(Date)

175 *Respondent's Exhibit 3*



176 *Respondent's Exhibit 4*

WAR DEPARTMENT
CONTINUOUS SECURITY DISTRICT OFFICE
904 Enquirer Building
CINCINNATI, OHIO

ACR/hc.

To insure prompt attention in replying refer to PPDB, No. Sect. V-1 Plant Guard Section.

Plant Protection Data Binder, Section V, Letter 1, Dated June 7, 1943

Subject: The Auxiliary Military Police.

1. Executive Order No. 8972, dated December 12, 1941, authorizes the Secretary of War and the Secretary of the Navy, "to establish and maintain military guards and patrols, and to take other appropriate measures to protect from injury and destruction," certain strategic premises, materials, and utilities. In accordance therewith the Secretary of War directed the military organization of plant guard forces as Auxiliary Military Police.

2. These guard forces will be organized as a civilian Auxiliary to the Military Police in all plants producing war material important in the war effort.

3. At the time any guard force is organized, the Commanding Officer having jurisdiction over the force will:

(*a*) Cause the Articles of War to be read and explained to each member of the guard force (see para. 18).

(*b*) Issue orders and regulations setting forth the duties and responsibilities of the guard force.

(*c*) Organize each guard force with a member of the Army of the United States in command and cause each force to be drilled and instructed with a view to supplementing the Army in resisting attack on war material, war premises and war utilities which the force is assigned to guard.

(*d*) Require each member of the guard force to give a pledge of loyalty to the United States, and to execute an agreement acknowledging that such Articles of War are understood by him and that he is subject to military law as long as he remains a member of the guard force. (A copy of the Guard Agreement is attached, CIPP 124.)

177 4. The purpose of organizing the plant guard force is to increase the authority, efficiency, and responsibility of the

guard forces at plants important to the prosecution of the war, and through military training to provide auxiliary forces throughout the United States to supplement the Army in wartime emergency situations.

5. Nothing in this letter will be construed as modifying the responsibility of the plant managements for providing adequate protection at all times against all hazards. The District Plant Guard Officer may, however, take appropriate action through the plant management to correct any condition deemed by him to result in or threaten defective or inadequate performance by the guard force of its ordinary protective duties.

6. The mission of a guard force of Auxiliary Military Police is:

(a) To provide interior and exterior protection of the plant against sabotage and espionage and natural hazards.

(b) To serve with the Army in providing the protection to the plant and its environs in emergency situations.

7. An emergency situation in which the Auxiliary Military Police may be called upon for military service may arise from flood, conflagration, or other disaster; internal disorders hazardous to property or production important to the prosecution of the war; protection from air raid; Fifth Column activity; paratroop attack or invasion; or it may arise from any other condition or circumstances involving the plant or its community.

8. A guard force, or any member thereof, whether on or off duty, may be assigned to duty in an emergency at places other than the premises of the plant normally served, provided only that in the opinion of the District Plant Guard Officer or other representative of the Army in command such assignment will contribute to the protection of the guard force's own plant and its environs or to the protection of its production.

9. In addition to the regular plant guards other groups of employees may be inducted as members of the Auxiliary Military Police. The District Plant Guard Officer will determine which groups are eligible.

10. Persons such as firemen, watchmen, and women guards may be included, provided they are able physically to
178 perform the duties and missions of the Auxiliary Military Police described herein and in the agreement signed by the guards.

11. Women guards may be armed, but in view of the Congressional policy that women auxiliary forces be limited to non-combatant duty, it is recommended that in forming plans for any emergency situations requiring the use of force against the enemy such plans will provide for assignment of women Auxiliary Military Police to non-combatant activities.

12. No minimum number of guards is required for the militarization of any guard force. Guard forces, no matter how small, will be militarized if the plants which they guard are so located that the guards can be organized, trained, and commanded efficiently by available Army personnel, and if in the opinion of the District Plant Guard Officer, the results obtainable are commensurate with the effort involved.

13. Employment of an alien as a plant guard must be approved by the Secretary of War in the same manner as employment of an alien having access to work on classified or aeronautical contracts.

14. The Provost Marshal General is charged with the general supervision of the activities relating to the Auxiliary Military Police as a part of the Internal Security program. The commanding generals of the Service Commands are responsible for the military organization, training, and command of the guard forces at the plants and installations within their respective Service Commands and under their jurisdiction.

15. The Commanding General of the Fifth Service Command has designated the Chiefs of the Continuous Security Districts as the Commanding Officers in their various districts. They are also the "Commanding Officer having jurisdiction over the plant guard forces" of plants and installations at which there is no local resident commanding officer. They then appoint District Plant Guard Officers, who are in direct charge of plant guard forces of such plants in their districts. For each plant or group of plants at which there is no local resident Commanding Officer, a Plant Guard Officer will be designated by the District Plant Guard Officer. The Plant Guard Officer is the member of the Army of the United States in command of the guard force and will report direct to the District Plant Guard Officer.

179 16. At each plant where there is a local resident Commanding Officer, this officer will be the Commanding Officer having jurisdiction over the guard force. He may serve as the Plant Guard Officer himself or cause another officer to be appointed as such.

17. If a plant at which the guard has been organized as Auxiliary Military Police is removed from the Service Command Responsibility List, the Commanding General of the Service Command will determine whether such guard force will be continued as Auxiliary Military Police and trained and commanded as before, or whether its status as such will be terminated.

18. Guard forces which are to be organized will be assembled at the earliest practicable date by the plant management at the request of the plant guard officer. At this assembly the Articles of War will be read and explained to each member of the guard force

by the plant guard officer or, in his absence or unavailability, by some other competent person who is an officer of the Army or civilian officer of the Auxiliary Military Police. As certain of the Articles of War are generally inapplicable to the Auxiliary Military Police, the foregoing directive will be considered complied with if articles 2, 58, 61–64, 66, 68–74, 76, 81–83, 85, 88–90, 92–94, 96, 104, 105 are read and explained. These articles define certain offenses punishable by court martial of which persons subject to military law may be guilty.

19. The Auxiliary Military Police, immediately after the Articles of War have been read and explained, will be impressed with the fact that the Government of the United States is interested in the security of the plant and its production, as essential to the successful prosecution of the war. To this end the plant guard officer will issue and post a guard order. Guard Order No. 1 will be posted at your plant. A copy of same is attached hereto. At the time of reading the Articles of War, each member of the guard force gives the pledge of loyalty to the United States and executes the plant guard agreement.

20. If a guard refuses to sign the agreement he may (but need not) be temporarily retained with the understanding that he will be dismissed as soon as he is replaced, and in any event within a reasonable time. The signed agreement will be retained by the District Plant Guard Officer. The guard force will be considered as a civilian auxiliary to the military police when 75 percent of the guards at a given plant have signed the agreement. A certificate of membership in the Auxiliary Military Police will be issued to each member. Each plant guard who becomes a member of the Auxiliary Military Police continues as such until he is released by the War Department from his obligations. This will take place when competent military authority has approved of his dismissal or resignation or when he has been discharged without honor.

180 21. Orders and regulations for the Auxiliary Military Police will be issued in the name of the Commanding Officer having jurisdiction over the guard forces. The Chief of the Continuous Security District is the Commanding Officer of the plant guard forces in the District. At civilian operated plants such orders will be issued after plant management has indicated its concurrence by signing the guard order in the lower left hand corner.

22. The Auxiliary Military Police will continue to function as formerly; that is, as when they were employed by the plant only and were not also under the direction of the Army. However, a member of the Army of the United States will be in command at

all times. He will be in command for purposes of instruction and drilling and, in particular, to take over the command of the force if and when an emergency justifying such action occurs. Although the plant guard officers will be in command at all times they will not supplant the civilian guard officers, and unless expediency demands otherwise, the plant guard officers will exercise their authority through the guard officers established by the plant management.

23. The Auxiliary Military Police are supplementing the Army of the United States in a vital task or protecting war material and war production facilities. Attempts to intimidate them or reduce or nullify their efficiency and interfere with the performance of their mission may constitute a violation of Federal as well as state criminal laws. Any and all such incidents are to be reported by the guard members to their chiefs and a detailed report will be made to the District Plant Guard Officer relative to each such incident.

24. Basically the militarization of the plant guard forces does not change the existing systems of hiring, compensation, and dismissal except as stated in paragraph 25. All remain, primarily, a matter between the guards and plant management. Guards in the employ of a private employer may, as heretofore, be dismissed and those who were Civil Service employees in the employ of the War Department may be dismissed by the local commanding officer, in accordance with Civil Service Regulations. In neither case is a Court Martial necessary.

25. A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto. Inasmuch as the guards are under
181 oath to the Army, the plant management may suspend a guard without pay pending approval of his dismissal by the District Plant Guard Officer and pending the termination of the guards enrollment as a member of the Auxiliary Military Police. This will usually be done on the management's recommendation unless an emergency requires the guards retention.

26. A certificate of Meritorious Conduct will be issued to each member of the Auxiliary Military Police whose services are terminated honorably. In the event of termination of services under conditions other than honorable no such Certificate will be issued. A communication may be addressed to the individual whose services have thus been terminated stating only the fact of termination and that the communication is not a Certificate of Meritorious Conduct.

27. The status of the employer in regard to the employee benefits for the guard force is not changed. For example, Social Security, Workmen's Compensation, Employer's Liability and vacation schedules remain unaffected. Employers should have a clear understanding with their insurance companies concerned.

28. A member of the Auxiliary Police must be physically fit to perform his duties properly and in an efficient manner. It is sufficient if his physical fitness satisfies the plant guard officer.

29. Each member of the Auxiliary Military Police will be properly uniformed by the plant. A complete uniform consisting of blouse or shirt, trousers and hat is not required, although the complete uniform is preferred. Obviously the uniform adopted by the plant must be worn by all members of the plant guard force.

30. Because the mission of the Auxiliary Military Police includes service in the Army, the laws of war require that the members wear distinctive insignia or marks capable of recognition at a distance. By wearing such insignia or marks, members, serving with the Army, will be recognized as legitimate troops and not deemed irregulars or guerillas. Accordingly, members of the Auxiliary Military Police in the Fifth Service Command will wear the insignia as outlined in Plant Production Data Binder letter Section V—letter 3.

31. Each member of the Auxiliary Military Police is authorized to wear a service stripe for each six months of service faithfully performed. Service stripes will be in accordance with Army Regulations. A Plant Protection Data Binder letter will be issued shortly completely describing service stripes.

182 32. Members of the Auxiliary Military Police, who are entitled thereto in their own right may wear, when in their plant guard uniform such decorations, service medals, ribbons, and badges as are authorized for wear on the United States Army service uniform.

33. For plants that have established proper plant protection proficiency and where the guard force is of adequate size, properly drilled, properly uniformed and meeting certain minimum requirements, a distinctive guidon for the Auxiliary Military Police Force at that plant will be authorized.

34. Each member of the Auxiliary Military Police must carry at all times a proper identification card completed and issued by this office. This identification card is described in Plant Protection Data Binder Letter Section V–6.

35. The Auxiliary Military Police must be armed with appropriate weapons furnished by the plant management. Training in the use of firearms and providing the ammunition therefor, are

functions of plant managements. Instruction in the use of firearms is being given by the plant guard officers as a part of the plant guard training program now being conducted.

36. The Auxiliary Military Police are agents of the Federal Government and will not be subject to any state or municipal requirement which conflicts with their war time duties. Plant Guards should not be permitted to wear or carry firearms away from the plant property, excepting when the fulfillment of their duties requires it. Also, an exception is the wearing of side arms by the plant guards to plant guard training schools or to pistol ranges where they are practicing firing revolvers.

37. In general, there will be no considerable additional advantage in deputizing the members of the Auxiliary Military Police as special policemen, sheriffs, or marshals. There will be individual cases, however, in which it will be advisable to continue the local or state official capacity. The authority of the plant guard includes power to arrest without a warrant for violation of the Sabotage Act (50, U. S. C., 101–106) or the Espionage Act (50, U. S. C., 21–32). The plant management continues to be charged with the training of its guard forces in their ordinary protective duties. In addition, the guard force must be qualified to perform its duties as set forth in paragraph 6. This includes the
185 ability to serve efficiently with the Army in any emergency situation which may arise (see paragraph 7). To this end, the Auxiliary Military Police will be trained by, or under the direction of the plant guard officer in military subjects in accordance with requirements established by the District Plant Guard Officer. The time to be devoted to such training will be determined by the plant guard officer. It will not exceed one hour per week or its equivalent except with the approval of the plant management.

38. When a member of the Auxiliary Military Police injures or kills a person while in the performance of his duties, he will be arrested and detained by the Plant Guard Officer. If a civil police official seeks to arrest him, the plant guard officer, under the authority of the 74th Article of War, may refuse to release the individual until such release is approved by the Commanding General of the Service Command. A member of the Auxiliary Military Police is entitled to the same protection as a sentinel under similar circumstances.

39. Members of the Auxiliary Military Police are eligible for the decoration "Medal of Merit" authorized by the President for award to civilians who distinguish themselves by especially meritorious conduct or by performance of outstanding services. All cases of members of the Auxiliary Military Police, who in the

opinion of the District Plant Guard Officer deserve consideration for this award will be referred through channels to the Office of the Provost Marshal General for transmission to the "Medal of Merit" Board. A full statement of facts and appropriate recommendations should be included.

40. Any case of meritorious conduct, which in the opinion of the District Plant Guard Officer does not warrant recommendation for the award of the "Medal of Merit", but which he deems deserving of official commendation will be the subject of a special order of commendation issued by the Commanding Officer having jurisdiction over the guard force. Such special orders will be issued promptly and with liberality and will be given appropriate publicity, particularly among the guard force concerned. A copy of such special order will be furnished to the employer.

184 41. Any questions concerning information given in the foregoing should be addressed directly to this office.

Yours very truly,

A. C. Rasmussen,
A. C. Rasmussen,
Lt. Col., Ord. Dept., District Chief.

Incls.: 2
CIPP 124—Guard Agreement.
CIPP 68—Guard Order #1.

185 *Respondent's Exhibit 5*

We are Permitted to Employ Only Citizens of the United States

APPLICATION FOR EMPLOYMENT

E. C. Atkins and Company

INDIANAPOLIS, INDIANA

Please Print — Draft Classification_____
Date_____ Social Security No._____
Name_____ Sex_____ Race_____
Last Name — First Name — Middle Name
Address_____ Phone_____
Number and Street — City — State
Age_____ Height: Ft_____ In_____ Weight_____ No. of Children_____
Ages_____ No. of Other Dependents_____
Relatives in Company: _____ Names and Relationship_____
Yes or No
Are You a Former Employee?_____ Date Last Employed by This Company_____
Yes or No
Why Did You Leave?_____
Check One: Married Single Widow(er) Divorced Separated

Citizen of the United States ___ Place of Birth _____
Yes or No
Date of Birth _____ If Foreign Born, State _____ Port of Entry
Date of Entry _____ Date of First Papers _____
Date of Last Papers _____ Place of Issuance Naturalization _____
How Long in U. S.? _____ How Long in City? _____
Years Years
Father's Name _____ Place of Birth _____ Citizen of U.S. _____
Yes or No
Mother's Maiden Name _____ Place of Birth _____ Citizen of U.S. _____
Yes or No

United States Military Service _____ Branch _____
Yes or No
How Discharged _____ Date _____ Are you Now a Member of Any Military or Naval Unit? _____ Have You Been to a Foreign Country in the Past 15 Years? _____
Yes or No
Yes or No

Education and Special Training:
Grade School _____ High School _____ College _____ Technical, Trade or Business _____
Years Years Years
High School _____
Years Name and Location
Course of Study _____ College _____
Name and Location
Subject Majored in _____ Do You Write or Speak Any Foreign Language? _____ If So, Which Language _____
What Is Your Hobby? _____ Do You Read Blue Prints? _____ How Well? _____

(For Married Applicants Only)

Husband's Name or Wife's Maiden Name } _____ Birthplace _____
Strike Out One—If Married Husband or Wife
Husband's or Wife's } Occupation _____ In An Emergency Notify _____
Strike Out One—If Married

186 Mark Number of Months Worked on Any of the Following:

OFFICE

Addressograph Machine
Bookkeeper, General Ledger
Bookkeeping, Machine
Clerk, Accounts Payable
Clerk, General File
Clerk, Mail
Clerk, Statistical
Comptometer
Purchasing
Secretarial
Tabulating Machine
Timekeeper
Typist Stenographer
Cost Accounting

EXPERIENCE NOT LISTED ABOVE

Welding, Arc, Steel
Welding, Aluminum
Sheet Metal, Bench
Brake, Metal
Bending and Rolling Machine
Shear, Foot
Cable Splicing
Exp. Assembly
Instrument Installation

MAINTENANCE

Blacksmith
Carpenter
Electrician
Janitor
Laborer
Millwright
Pipefitter
Welding

ENGINEERING EXPERIENCE

DRAFTING

Layout
Detailing
Checker
Tool Design
Tool Routing
Blue Print Machine

MACHINE SHOP

Milling Machine
Mill, Horizontal Boring
Mill, Thread
Profiler
Broach
Lathe, Engine
Lathe, Bench
Lathe, Automatic
Lathe, Turret
Jig Borer
Drill Press
Drill Press, Multiple Spindle
Radial Drill
Casting Layout
Screw Machine, Hand
Screw Machine, Automatic
Gear Shaper
Gear Cutter
Grinder, Internal
Grinder, Cylinder Internal
Grinder, External
Grinder, Gear
Grinder, Surface
Grinder, Centerless
Grinder, Tool
Grinder, Drill
Grinder, Cutter
Buffing and Polishing
Machinist, Bench
Machinist, All Around
Die Making
Jig Building
Tool Making
Template Making
Punch Press

MISCELLANEOUS

Electro Plating
Heat Treating
Inspection, Receiving
Inspection, Floor
Inspection, Final
Inspection, Assembly
Inspection, Tool and Gauge
Pattern Making, Wood
Pattern Making, Metal
Sand Blasting
Shipping and Receiving
Bearing Casting

EXECUTIVE EXPERIENCE

State Nature

Have You a Complete Set of Tools? Yes ___ No ___ If Not, What Tools Have You? _____

List All Past Employment, etc.: Last Employment in Space No. 1. Include Periods of Unemployment.

Name of past employers and addresses	Dates of employment				Job classification or duties	Salary or wages	Reason for leaving
	From		To				
	Mo.	Yr.	Mo.	Yr.			
(1)							
(2)							
(3)							
(4)							
(5)							
(6)							

List Three References Not Relatives or Employees of This Company.

Name _____ Address _____ Occupation _____

Name _____ Address _____ Occupation _____

Name _____ Address _____ Occupation _____

For What Kind of Work Are You Applying? _____

Second Choice _____ Have You Any Physical Disability? —— If So, State Condition _____

187

Respondent's Exhibit 6

UNITED STATES OF AMERICA

AUXILIARY MILITARY POLICE

ARMY OF THE UNITED STATES

CERTIFICATE OF ENROLLMENT

This is to Certify that Henry Adams Johnston has been voluntarily and duly enrolled as an Auxiliary to the Military Police with the rank of _____ for service with the Army

of the United States at E. C. Atkins & Company, Indianapolis, Indiana, and is subject to Military Law for the duration of the War or until the earlier official termination by the War Department of his services as an Auxiliary to the Military Police.

For the Commanding General, Fifth Service Command:
Dated 29 June 1943.

A. C. Rasmussen,
A. C. RASMUSSEN,
Lt. Col., Ord. Dept.,
Chief, Continuous Security District Office,
Cincinnati, Ohio.

Official:
B. R. Wetenhall,
B. R. WETENHALL,
Capt., C. M. P.
District Plant Guard Officer,
Cont. Secty. Dist. Off., Cincinnati, O.

188 *Respondent's Exhibit 7*

UNITED STATES OF AMERICA

AUXILIARY MILITARY POLICE

ARMY OF THE UNITED STATES

CERTIFICATE OF MERITORIOUS CONDUCT

This is to Certify that Wilbur H. Murrell has faithfully served as an Auxiliary to the Military Police of the Army of the United States at Fall Creek Ordnance Plant, Indianapolis, Indiana, from _____, 19____, to June 1, 1943, and that his services are hereby honorably terminated.

For the Commanding General, Fifth Service Command:
Dated June 11, 1943.

A. C. RASMUSSEN.

Official:
B. R. Wetenhall,
B. R. WETENHALL,
Plant Guard Officer.

189 *Respondent's Exhibit 8*

Cincinnati Office

Aye Eldridge is hereby released from the obligations assumed upon signing agreement as a Civilian Auxiliary to the Military Police at the Fall Creek Ordance Plant, Indianapolis, Indiana.

By order of the Chief, Cincinnati District Continuous Security Branch.

20 September 1943.

B. R. Wetenhall,
B. R. WETENHALL,
Captain, C. M. P.,
District Plant Guard Officer.

190 *Respondent's Exhibit 9*

THE ARTICLES OF WAR

APPENDIX 1 TO A MANUAL FOR COURTS-MARTIAL, U. S. ARMY, 1928

191 Appendix 1

THE ARTICLES OF WAR

The articles included in this section (sec. 1, Ch. II, act of June 4, 1920, 41 Stat. 787) shall be known as the Articles of War and shall at all times and in all places govern the Armies of the United States.

I. PRELIMINARY PROVISIONS

ART. 1. Definitions.—The following words when used in these articles shall be construed in the sense indicated in this article, unless the context shows that a different sense is intended, namely:

(a) The word "officer" shall be construed to refer to a commissioned officer;

(b) The word "soldier" shall be construed as including a noncommissioned officer, a private, or any other enlisted man;

(c) The word "company" shall be understood as including a troop or battery; and

(d) The word "battalion" shall be understood as including a squadron.

ART. 2. Persons Subject to Military Law.—The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law," or "per-

sons subject to military law," whenever used in these articles: Provided, That nothing contained in this act, except as specifically provided in article 2, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction unless otherwise specifically provided by law.

(a) All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same;

(b) Cadets;

(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: Provided, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;

(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

(e) All persons under sentence adjudged by courts-martial;

192 (f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia.

Patients in the Army and Navy General Hospital, Hot Springs, Ark. (Act of March 3, 1909; 35 Stat. 748.)

Personnel of the Coast and Geodetic Survey transferred to the service of the War Department. (Sec. 16, act of May 22, 1917; 40 Stat. 88.)

Personnel of the Lighthouse Service transferred to the service of the War Department. (Act of August 29, 1916; 39 Stat. 602.)

Inmates of the National Home for Disabled Volunteer Soldiers. (R. S. 4835.)

Personnel of the Public Health Service detailed in time of war for duty with the Army. (J. R. No. 9, July 9, 1917; 40 Stat. 242.)

Inmates of the Soldier's Home. (R. S. 4824.)

Civilian employees, Dig. J. A. G., February 1918, p. 7; Dig. J. A. G. 1918, pp. 79, 195; Dig. J. A. G. 1919, pp. 13, 339.

Members of Red Cross, Dig. J. A. G. April–December 1917, p. 98; Dig. J. A. G. 1919, p. 96.

II. COURTS-MARTIAL

ART. 3. Courts-Martial Classified.—Courts-martial shall be of three kinds, namely:

First, general courts-martial;

Second, special courts-martial; and

Third, summary courts-martial.

A Composition

ART. 4. Who May Serve on Courts-Martial.—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial. When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof.

Competency of retired officers (Dig. J. A. G., January–June 1921, p. 55); of reserve officers on active duty (Dig. J. A. G. 1924, p. 7); of National Guard officer attending service school (Dig. J. A. G. 1924, p. 7).

All volunteer officers are competent to sit from the dates of their muster or acceptance into the military service of the United States; and all other officers lawfully called, drafted, or ordered into, or to duty for training in, the military service of the United States, from the dates are required by the terms of the call, draft, or order to obey the same.

As to presumption of competency, see Dig. J. A. G. 1922, p. 118.

ART. 5. General Courts-Martial.—General courts-martial may consist of any number of officers not less than five.

ART. 6. Special Courts-Martial.—Special courts-martial may consist of any number of officers not less than three.

ART. 7. Summary Courts-Martial.—A summary court-martial shall consist of one officer.

B. By Whom Appointed

ART. 8. General Courts-Martial.—The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an army, an army corps, a division, or a separate brigade, and, when empowered by the President, the
193 commanding officer of any district or of any force or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and no officer shall be eligible to sit as a member of such court when he is the accuser or a witnes for the prosecution.

The authority appointing a general court-martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. The law member, in addition to his duties as a member, shall perform such other duties as the President may by regulations prescribe.

The order appointing a general court-martial when issued by a commander specially empowered thereto by the President need not cite the order of the President. (Dig. J. A. G. 1921, p. 56.)

ART. 9. Special Courts-Martial.—The commanding officer of a district, garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a brigade, regiment, detached battalion, or other detached command may appoint special courts-martial; but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed desirable; and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

ART. 10. Summary Courts-Martial.—The commanding officer of a garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a regiment, detached battalion, detached company, or other detachment may appoint summary courts-martial; but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable: Provided, That when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him.

ART. 11. Appointment of Trial Judge Advocates and Counsel.—For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel, and for each general court-martial one or more assistant trial judge advocates and one or more assistant defense counsel when necessary: Provided, however, That no officer who has acted as member, trial judge advocate, assistant trial judge advocate, defense counsel, or assistant defense counsel in any case shall subsequently act as staff judge advocate to the reviewing or confirming authority upon the same case.

C. Jurisdiction

ART. 12. General Courts-Martial.—General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: Provided, That no officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy: Provided further, That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interest of the service shall so re-
194 quire, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses set out in Article 13; but the limitations upon jurisdiction as to persons and upon punishing power set out in said article shall be observed.

ART. 13. Special Courts-Martial.—Special courts-martial shall have power to try any person subject to military law for any crime or offense not capital made punishable by these articles: Provided, That the President may, by regulations, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law.

Special courts-martial shall not have power to adjudge confinement in excess of six months, nor to adjudge forfeiture of more than two-thirds pay per month for a period of not exceeding six months.

ART. 14. Summary Courts-Martial.—Summary courts-martial shall have power to try any person subject to military law, except an officer, a member of the Army Nurse Corps, a warrant officer, an Army field clerk, a field clerk Quartermaster Corps, a cadet, or a soldier holding the privileges of a certificate of eligibility to promotion, for any crime or offense not capital made punishable by these articles: Provided, That uncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring

them to trial before a general court-martial: Provided further, That the President may, by regulations, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law.

Summary courts-martial shall not have power to adjudge confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of one month's pay.

ART. 15. Jurisdiction not Exclusive.—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war be triable by such military commissions, provost courts, or other military tribunals.

ART. 16. Officers; How Triable.—Officers shall be triable only by general and special courts-martial, and in no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank.

The provision as to rank is directory only on the appointing authority. The sentence of a court cannot be collaterally attacked by going into an inquiry whether the trial by officers inferior in rank to the accused was or was not avoidable. (See Swain v. U. S., 165 U. S. 553.)

D. Procedure

ART. 17. Trial Judge Advocate to Prosecute; Counsel to Defend.—The trial judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to Article 11. Should the accused have counsel of his own selection, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel.

ART. 18. Challenges.—Members of a general or special court-martial may be challenged by the accused or the trial judge advocate for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time. Challenges by the trial judge advocate shall ordinarily be presented and decided before those by the accused are offered. Each side shall be entitled to one peremptory challenge; but the law member of the court shall not be challenged except for cause.

195

ART. 19. Oaths.—The trial judge advocate of a general or special court-martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation: "You, A. B., do swear (or affirm) that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority or duly announced by the court, except to the trial judge advocate and assistant trial judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial upon a challenge or upon the findings or sentence, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God."

When the oath or affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the trial judge advocate and to each assistant trial judge advocate, if any, an oath or affirmation in the following form: "You, A. B., do swear (or affirm) that you will faithfully and impartially perform the duties of a trial judge advocate, and will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed. So help you God."

All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: "You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God."

Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: "You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God."

Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: "You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God."

In case of affirmation the closing sentence of adjuration will be omitted.

ART. 20. Continuances.—A court-martial may, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just.

ART. 21. Refusal or Failure to Plead.—When an accused arraigned before a court-martial fails or refuses to plead, or answers foreign to the purpose, or after a plea of guilty makes a statement inconsistent with the plea, or when it appears to the court that he entered a plea of guilty improvidently or through lack of understanding of its meaning and effect, the court shall proceed to trial and judgment as if he had pleaded not guilty.

ART. 22. Process to Obtain Witnesses.—Every trial judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of the United States, having criminal jurisdiction, may lawfully issue; but such process shall run to any part of the United States, its territories, and possessions.

196

ART. 23. Refusal to Appear or Testify.—Every person not subject to military law who, being duly subpœnaed to appear as a witness before any military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may have been legally subpœnaed to produce, shall be deemed guilty of misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than $500 or imprisonment not to exceed six months, or both, at the discretion of the court: Provided, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses: Provided further, That every person not subject to military law, who before any court-martial, military tribunal, or military board, or in connection with, or in relation to any proceedings or

investigation before it or had under any of the provisions of this act, is guilty of any of the acts made punishable as offenses against public justice by any provision of chapter 6 of the act of March 4, 1909, entitled "An act to codify, revise, and amend the penal laws of the United States" (vol. 35, Stat. L. p. 1088), or any amendment thereof, shall be punished as therein provided.

ART. 24. Compulsory Self-Incrimination Prohibited.—No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him.

ART. 25. Depositions—When Admissible.—A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or District in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: Provided, That testimony by deposition may be adduced for the defense in capital cases.

197 ART. 26. Depositions—Before Whom Taken.—Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

ART. 27. Courts of Inquiry—Records of, When Admissible.—The record of the proceedings of a court of inquiry may, with the consent of the accused, be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board: *Provided*, That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer.

ART. 28. Certain Acts to Constitute Desertion.—Any officer who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to absent himself permanently therefrom shall be deemed a deserter.

Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States; and where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein.

Any person subject to military law, who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter.

ART. 29. Court to Announce Action.—Whenever the court has acquitted the accused upon all specifications and charges, the court shall at once announce such result in open court. Under such regulations as the President may prescribe the findings and sentence in other cases may be similarly announced.

ART. 30. Closed Sessions.—Whenever a general or special court-martial shall sit in closed session, the trial judge advocate and the assistant trial judge advocate, if any, shall withdraw; and when their assistance in referring to the recorded evidence is required, it shall be obtained in open court, and in the presence of the accused and of his counsel, if there be any.

ART. 31. Method of Voting.—Voting by members of a general or special court-martial upon questions of challenge, on the findings, and on the sentence shall be by secret written ballot. The junior member of the court shall in each case count the votes, which count shall be checked by the president, who will forthwith announce the result of the ballot to the members of the court. The law member of the court, if any, or if there be no law member of the court, then the president, may rule in open court upon interlocutory questions, other than challenge, arising during the proceedings: *Provided*, That unless such ruling be made by the law member of the court if any member object thereto the court shall be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank: *And provided further*, That if any such ruling be made by the law member of the court upon any interlocutory question other than an objection to the admissibility of evidence offered during the trial, and any member objects to the ruling, the court shall likewise be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank: *Provided further, however*, That the

phrase, "objection to the admissibility of evidence offered during the trial," as used in the next preceding proviso hereof, shall not be construed to include questions as to the order of the introduction of witnesses or other evidence, nor of the recall of witnesses for further examination, nor as to whether expert witnesses shall be admitted or called upon any question, nor as to whether the court shall view the premises where an offense is alleged to have been committed, nor as to the competency of witnesses, as, for instance, of children, witnesses alleged to be mentally incompetent, and the like, nor as to the insanity of accused, or whether the existence of mental disease or mental derangement on the part of the accused has become an issue in the trial, or accused required to submit to physical examination, nor whether any argument or statement of counsel for the accused or of the trial judge advocate is improper, nor any ruling in a case involving military strategy or tactics or correct military action; but, upon all these questions arising on the trial, if any member object to any ruling of the law member, the court shall be cleared and closed and the question decided by majority vote of the members in the manner aforesaid.

198

ART. 32. Contempts.—A military tribunal may punish as for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder: *Provided*, That such punishment shall in no case exceed one month's confinement, or a fine of $100, or both.

ART. 33. Records—General Courts-Martial.—Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the trial judge advocate; but in case the record can not be authenticated by the president and trial judge advocate, by reason of the death, disability, or absence of either or both of them, it shall be signed by a member in lieu of the president and by an assistant trial judge advocate, if there be one, in lieu of the trial judge advocate; otherwise by another member of the court.

ART. 34. Records—Special and Summary Courts-Martial.—Each special court-martial and each summary court-martial shall keep a record of its proceedings, separate for each case, which record shall contain such matter and be authenticated in such manner as may be required by regulations which the President may from time to time prescribe.

ART. 35. Disposition of Records—General Courts-Martial.—The trial judge advocate of each general court-martial shall, with such expedition as circumstances may permit, forward to the appointing authority or to his successor in command the original record

of the proceedings of such court in the trial of each case. All records of such proceedings shall, after having been acted upon, be transmitted to the Judge Advocate General of the Army.

ART. 36. Deposition of Records—Special and Summary Courts-Martial.—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by special court-martial and a report of each trial by summary court-martial shall be transmitted to such general headquarters as the President may designate in regulations, there to be filed in the office of the judge advocate. When no longer of use, records of summary courts-martial may be destroyed.

ART. 37. Irregularities—Effect of.—The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused: *Provided*, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles: *Provided further*, That the omission of the words
199 "hard labor" in any sentence of a court-martial adjudging imprisonment or confinement shall not be construed as depriving the authorities executing such sentence of imprisonment or confinement of the power to require hard labor as a part of the punishment in any case where it is authorized by the Executive order prescribing maximum punishments.

ART. 38. President May Prescribe Rules.—The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: Provided, That nothing contrary to or inconsistent with these articles shall be so prescribed: Provided further, That all rules made in pursuance of this article shall be laid before the Congress annually.

E. Limitations Upon Prosecutions

ART. 39. As to Time.—Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the ar-

raignment of such person: Provided, That for desertion in time of peace or for any crime or offense punishable under articles ninety-three and ninety-four of this code the period of limitations upon trial and punishment by court-martial shall be three years: Provided further, That the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: And provided further, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law.

"Manifest impediment," as used in the eighty-eighth article (a predecessor of the present thirty-ninth Article of War) does not mean merely want of evidence, or ignorance as to the offender or offense by the military authorities, but it means something akin to absence, want of power, or a physical inability to bring the party charged to trial. A "manifest impediment" does not exist where the military authorities, by reasonable diligence could make such party amenable to justice; and any concealment of the evidence of his guilt, or other like fraud on his part by which the prosecution is delayed until the time of the bar has run does not in and of itself deprive him of the benefit of the statute (14 Op. Atty. Gen. 265).

ART. 40. As to Number.—No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.

No authority shall return a record of trial to any court martial for reconsideration of—

(a) An acquittal; or

(b) A finding of not guilty of any specification; or

(c) A finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some Article of War; or

(d) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

200 And no court-martial in any proceedings on revision, shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited.

The findings of an army administrative board, or a proceeding before an investigating board, can not preclude trial by court-martial. (Dig. J. A. G. 1923, p. 99; Dig. J. A. G. 1922, p. 62.)

F. Punishments

ART. 41. Cruel and Unusual Punishments Prohibited.—Cruel and unusual punishments of every kind, including flogging, branding, marking, or tattooing on the body, are prohibited.

ART. 42. Places of Confinement—When Lawful.—Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, and unless, also the period of confinement authorized and adjudged by such court-martial is more than one year: Provided, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions, any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: Provided further, That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States: Provided further, That persons sentenced to dishonorable discharge and to confinement, not in a penitentiary, shall be confined in the United States Disciplinary Barracks or elsewhere as the Secretary of War or the reviewing authority may direct, but not in a penitentiay.

ART. 43. Death Sentence—When Lawful.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all of the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote.

ART. 44. Cowardice; Fraud—Accessory Penalty.—When an officer is dismissed from the service for cowardice or fraud, the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp and in the State from which the offender came or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him.

ART. 45. Maximum Limits.—Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial the punishment shall not exceed such limit or limits as the President may from time to time prescribe: Provided, That in time of peace the period of confinement in a penitentiary shall in no case exceed the maximum period prescribed by the law which, under article 42 of these articles, permits confinement in a penitentiary, unless in addition to the offense so punishable under such law the accused shall have been convicted at the same time of one or more other offenses.

201

C. Action by Appointing or Superior Authority

ART. 46. Action by Convening Authority.—Under such regulations as may be prescribed by the President every record of trial by general court-martial or military commission received by a reviewing or confirming authority shall be referred by him, before he acts thereon, to his staff judge advocate or to the Judge Advocate General. No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being.

ART. 47. Powers Incident to Power to Approve.—The power to approve the sentence of a court-martial shall be held to include:

(a) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt; and

(b) The power to approve or disapprove the whole or any part of the sentence.

(c) The power to remand a case for rehearing, under the provisions of article 50½.

ART. 48. Confirmation—When Required.—In addition to the approval required by article 46, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, namely:

(a) Any sentence respecting a general officer;

(b) Any sentence extending to the dismissal of an officer, except that in time of war a sentence extending to the dismissal of an officer below the grade of brigadier general may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division;

(c) Any sentence extending to the suspension or dismissal of a cadet; and

(d) Any sentence of death, except in the cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies; and in such excepted cases a sentence of death may be carried into execution, subject to the provisions of article 50½, upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division.

When the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is necessary.

The reviewing authority, who was the commanding general of the American Expeditionary Forces in Siberia, which consisted of two regiments of Infantry and some special units, directed the execution of the sentence of dismissal of an officer. The words "Army" and "Expeditionary Forces" are not synonymous. * * * Such reviewing authority was without power under A. W. 48 to confirm an order executing a sentence of dismissal of an officer. (Dig. J.A. G., 1919, p. 46.)

ART. 49. Powers Incident to Power to Confirm.—The power to confirm the sentence of a court-martial shall be held to include:

(a) The power to confirm or disapprove a finding, and to confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when,
202 in the opinion of the authority having power to confirm, the evidence of record requires a finding of only the lesser degree of guilt; and

(b) The power to confirm or disapprove the whole or any part of the sentence.

(c) The power to remand a case for rehearing, under the provisions of article 50½.

ART. 50. Mitigation or Remission of Sentences.—The power to order the execution of the sentence adjudged by a court-martial shall be held to include, inter alia, the power to mitigate or remit the whole or any part of the sentence.

Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries

and the United States Disciplinary Barracks, in which the person under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority; but no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority, and no approved sentence of loss of files by an officer shall be remitted or mitigated by any authority inferior to the President, except as provided in the fifty-second article.

When empowered by the President so to do, the commanding general of the Army in the field or the commanding general of the territorial department or division, may approve or confirm and commute (but not approve or confirm without commuting), mitigate, or remit and then order executed as commuted, mitigated, or remitted any sentence which under these articles requires the confirmation of the President before the same may be executed.

The power of remission or mitigation shall extend to all uncollected forfeitures adjudged by sentence or court-martial.

ART. 50½. Review: Rehearing.—Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department.

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of article 46, article 48, or article 51 is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion, in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President.

Except as herein provided, no authority shall order the execution of any other sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence; except that the proper reviewing or confirming authority may upon his approval of a sentence involving dishonorable discharge or confinement in a penitentiary order its execution if it is based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty. When the board of review, with the approval of the Judge Advocate General, holds the record in a case in which the order of execution has been withheld under the provisions of this paragraph legally sufficient to support the findings and sentence, the

Judge Advocate General shall so advise the reviewing or confirming authority from whom the record was received, who may thereupon order the execution of the sentence. When in
203 a case in which the order of execution has been withheld under the provisions of this paragraph, the board of review holds the record of trial legally insufficient to support the findings or sentence, either in whole or in part, or that errors of law have been committed injuriously affecting the substantial rights of the accused, and the Judge Advocate General concurs in such holding of the board of review, such findings and sentence shall be vacated in whole or in part in accord with such holding and the recommendations of the Judge Advocate General thereon, and the record shall be transmitted through the proper channels to the convening authority for a rehearing or such other action as may be proper. In the event that the Judge Advocate General shall not concur in the holding of the board of review, the Judge Advocate General shall forward all the papers in the case, including the opinion of the board of review and his own dissent therefrom, directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing authority or confirming authority below, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove, in whole or in part, any finding of guilty and may disapprove or vacate the sentence, in whole or in part.

When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding: *Provided*, That such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial legally insufficient to support the findings or sentence or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority. After any such rehearing had on the order of the President, the record of trial shall, after examination by the board of review, be

transmitted by the Judge Advocate General, with the board's opinion and his recommendations, directly to the Secretary of War for the action of the President.

Every record of trial by general court-martial, examination of which by the board of review is not hereinbefore in this article provided for, shall nevertheless be examined in the Judge Advocate General's Office; and if found legally insufficient to support the findings and sentence, in whole or in part, shall be examined by the board of review, and the board, if it also finds that such record is legally insufficient to support the findings and sentence, in whole or in part, shall, in writing, submit its opinion to the Judge Advocate General, who shall transmit the record and the board's opinion, with his recommendation, directly to the Secretary of War for the action of the President. In any such case the President may approve, disapprove or vacate, in whole or in part, any findings of guilty, or confirm, mitigate, commute, remit, or vacate any sentence, in whole or in part, and direct the execution of the sentence as confirmed or modified, and he may restore the accused to all rights affected by the findings and sentence, or part thereof, held to be invalid; and the President's necessary orders to this end shall be binding upon all departments and officers of the Government.

Whenever necessary, the Judge Advocate General may constitute two or more boards of review in his office, with equal powers and duties.

Whenever the President deems such action necessary, he may direct the Judge Advocate General to establish a branch of his office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office a board of review, or more than one. Such Assistant Judge Advocate General and such board or boards of review shall be empowered to perform for that command, under the general supervision of the Judge Advocate General, the duties which the Judge Advocate General and the board or boards of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President.

Accused was sentenced to dishonorable discharge, all forfeitures, and 10 years' confinement. The reviewing authority approved the sentence, but reduced the period of confinement to five years and forwarded the record of trial for review under the provisions of A. W. 50½. The board of review, the Acting Judge Advocate General concurring, held the record of trial legally sufficient to support the sentence. In publishing the general court-martial order in the case no mention was made of the reduction in the term of confinement. *Held*, That the only sentence acted upon by the board of review and the Judge Advocate General was the one as

originally approved by the reviewing authority and that the reviewing authority did not have the power to order a greater sentence into execution. (Dig. J. A. G. 1922, p. 71.).

When under this article the Board of review holds a record of trial legally insufficient to support the findings or sentence, and such holding is concurred in by the Judge Advocate General, such finding or sentence is thereby vacated and the same can not be reconsidered for the purpose of reversing such holding. (Dig. J. A. G. 1923, p. 52.)

Except where the President is the reviewing or confirming authority, it is not the function of the board of review or the Judge Advocate General, in passing upon the legal sufficiency of a record under A. W. 50½, to weigh evidence, judge of the credibility of witnesses, or determine controverted questions of fact. In such cases the law gives to the court-martial and the reviewing authority exclusively this function of weighing evidence and determining what facts are proved thereby; therefore, if the record of trial contains any evidence which, if true, is sufficient to support the findings of guilty, the board of review and the Judge Advocate General are not permitted by law, for the purpose of finding the record not legally sufficient to support the findings, to consider as established such facts as are inconsistent with the findings even though there be uncontradicted evidence of such facts. C. M. 152797.

When both the board of review and the Judge Advocate General hold the record of trial by general court-martial to be legally insufficient to support a sentence requiring confirmation by the President before its execution, the record should not be submitted to the Secretary of War for the action of the President but should be returned to the reviewing authority in accordance with the provisions of A. W. 50½ for rehearing or such other action as may be proper. (Ops. J. A. G., December 29, 1922, approved by the Secretary of War December 30, 1922, in C. M. 154185.)

When under the provisions of A. W. 50½ the Judge Advocate General advises the reviewing or confirming authority of the holding of the board of review, and his concurrence therein, he may in a separate communication, for reasons stated therein, advise such reviewing or confirming authority that he deems the sentence unnecessarily severe or that in his opinion one or more of the findings of guilty should be disapproved.

ART. 51. Suspension of Sentences of Dismissal or Death.—The authority competent to order the execution of a sentence of dismissal of an officer or a sentence of death may suspend such sentence until the pleasure of the President be known, and in case of such suspension a copy of the order of suspension, together with

a copy of the record of trial, shall immediately be transmitted to the President.

205 ART. 52. Suspension of Sentences.—The authority competent to order the execution of the sentence of a court-martial may, at the time of the approval of such sentence, suspend the execution, in whole or in part, of any such sentence as does not extend to death, and may restore the person under sentence to duty during such suspension; and the Secretary of War or the commanding officer holding general court-martial jurisdiction over any such offender, may at any time thereafter, while the sentence is being served, suspend the execution, in whole or in part, of the balance of such sentence and restore the person under sentence to duty during such suspension. A sentence, or any part thereof, which has been so suspended may be remitted, in whole or in part, except in cases of persons confined in the United States Disciplinary Barracks or its branches, by the officer who suspended the same, by his successor in office, or by any officer exercising appropriate court-martial jurisdiction over the command in which the person under sentence may be serving at the time, and, subject to the foregoing exceptions, the same authority may vacate the order of suspension at any time and order the execution of the sentence or the suspended part thereof in so far as the same shall not have been previously remitted, subject to like power of suspension. The death or honorable discharge of a person under a suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence.

ART. 53. Execution or Remission—Confinement in Disciplinary Barracks.—When a sentence of dishonorable discharge has been suspended until the soldier's release from confinement, the execution or remission of any part of his sentence shall, if the soldier be confined in the United States Disciplinary Barracks, or any branch thereof, be directed by the Secretary of War.

III. PUNITIVE ARTICLES

A. Enlistment; Muster; Returns

ART. 54. Fraudulent Enlistment.—Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct.

ART. 55. Officer Making Unlawful Enlistment.—Any officer who knowingly enlists or musters into the military service any person whose enlistment or muster in is prohibited by law, regulations,

or orders shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

ART. 56. False Muster.—Any officer who knowingly makes a false muster of man or animal, or who signs or directs or allows the signing of any muster roll knowing the same to contain a false muster or false statement as to the absence or pay of an officer or soldier, or who wrongfully takes money or other consideration on mustering in a regiment, company, or other organization, or on signing muster rolls, or who knowingly musters as an officer or soldier a person who is not such officer or soldier, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

ART. 57. False returns—Omission to Render Returns.—Every officer whose duty it is to render to the War Department or other superior authority a return of the state of the troops under his command, or of the arms, ammunition, clothing, funds, or other property thereunto belonging, who knowingly makes a false return thereof shall be dismissed from the service and suffer such other punishment as a court-martial may direct. And any
206 officer who, through neglect or design, omits to render such return shall be punished as a court-martial may direct.

B. Desertion; Absence Without Leave

ART. 58. Desertion.—Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

ART. 59. Advising or Aiding Another to Desert.—Any person subject to military law who advises or persuades or knowingly assists another to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

ART. 60. Entertaining a Deserter.—Any officer who, after having discovered that a soldier in his command is a deserter from the military or naval service or from the Marine Corps, retains such deserter in his command without informing superior authority or the commander of the organization to which the deserter belongs, shall be punished as a court-martial may direct.

ART. 61. Absence Without Leave.—Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper

leave, or absents himself from his command, guard, quarters, station, or camp without proper leave shall be punished as a court-martial may direct.

C. Disrespect; Insubordination; Mutiny

ART. 62. Disrespect Toward the President, Vice President, Congress, Secretary of War, Governors, Legislatures.—Any officer who uses contemptuous or disrespectful words against the President, Vice President, the Congress of the United States, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct.

ART. 63. Disrespect Toward Superior Officer.—Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished as a court-martial may direct.

ART. 64. Assaulting or Willfully Disobeying Superior Officer.—Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct.

ART. 65. Insubordinate Conduct Toward Noncommissioned Officer.—Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a warrant officer or a noncommissioned officer while in the execution of his office, or uses threatening or insulting language or behaves in an insubordinate or disrespectful manner toward a warrant officer or a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct.

207 ART. 66. Mutiny or Sedition.—Any person subject to military law who attempts to creat' or who begins, excites, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court martial may direct.

ART. 67 Failure to Sup'ress Mutiny or Sedition.—Any Officer, or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or, knowing or having reason to believe that a mutiny or sedition is to take place, does not without delay give information thereof to his commanding officer shall suffer death or such other punishment as a court martial may direct.

ART. 68. Quarrels; Frays; Disorders.—All officers, members of the Army Nurse Corps, warrant officers, Army field clerks Quartermaster Corps, and noncommissioned officers have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order officers who take part in the same into arrest, and other persons subject to military law who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer, nurse, band leader, warrant officer, field clerk, or noncommissioned officer or draws a weapon upon or otherwise threatens or does violence to him, shall be punished as a court martial may direct.

D. ARREST; CONFINEMENT

ART. 69. Arrest or Confinement.—Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; but when charged with a minor offense only, such person shall not ordinarily be placed in confinement. Any person placed in arrest under the provisions of this article, shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer or cadet who breaks his arrest or who escapes confinement, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be dismissed from the service or suffer such other punishment as a court martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court martial may direct.

ART. 70. Charges; Action Upon.—Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein and that the same are true in fact, to the best of his knowledge and belief.

No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are

forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

[308] Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for a trial by general court-martial, the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had; and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

ART. 71. Refusal to Receive and Keep Prisoners.—No provost marshal or commander of a guard shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States, provided the officer committing shall, at the time, deliver an account in writing, signed by himself, of the crime or offense charged against the prisoner. Any officer or soldier so refusing shall be punished as a court-martial may direct.

ART. 72. Report of Prisoners Received.—Every commander of a guard to whose charge a prisoner is committed shall, within twenty-four hours after such confinement, or as soon as he is relieved from his guard, report in writing to the commanding officer the name of such prisoner, the offense charged against him, and the name of the officer committing him; and if he fails to make such report, he shall be punished as a court-martial may direct.

ART. 73. Releasing Prisoner Without Proper Authority.—Any person subject to military law who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any prisoner so committed to escape, shall be punished as a court-martial may direct.

ART. 74. Delivery of Offenders to Civil Authorities.—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction shall be
209 held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence.

See Dig. J. A. G. 1912, pp. 134–136.

"When any civil official of the State of * * * attempts to arrest any person subject to military law upon the military reservation at fort * * *, the person whose arrest is sought must inform the civil official that he is required to make the arrest through the post commander and that the person whose arrest is sought cannot otherwise submit. If, after this, the civil official persists, the arrest will be prevented unless the procedure indicated under the 74th Article of War is followed." The foregoing instruction by a corps area commander was held subject to no objection. (See Dig. J. A. G. 1925, p. 1.)

E. War Offenses

ART. 75. Misbehavior Before the Enemy.—Any officer or soldier who, before the enemy, misbehaves himself, runs away, or shamefully abandons or delivers up or by any misconduct, disobedience, or neglect endangers the safety of any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camp, garrison, or

quarters, shall suffer death or such other punishment as a court-martial may direct.

ART. 76. Subordinates Compelling Commander to Surrender.—Any person subject to military law who compels or attempts to compel any commander of any garrison, fort, post, camp, guard, or other command, to give it up to the enemy or to abandon it shall be punishable with death or such other punishment as a court-martial may direct.

ART. 77. Improper Use of Countersign.—Any person subject to military law who makes known the parole or countersign to any person not entitled to receive it according to the rules and discipline of war, or gives a parole or countersign different from that which he received, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct.

ART. 78. Forcing a Safeguard.—Any person subject to military law who, in time of war, forces a safeguard shall suffer death or such other punishment as a court-martial may direct.

ART. 79. Captured Property to be Secured for Public Service.—All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct.

ART. 80. Dealing in Captured or Abandoned Property.—Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties.

ART. 81. Relieving, Corresponding With, or Aiding the Enemy.—Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or
210 gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct.

ART. 82. Spies.—Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United

States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.

A person apprehended upon United States territory not under martial law, who had not entered any camp, fortification, or other military premises of the United States and who had not come through the fighting lines or field of military operations, cannot be tried as a spy by a military tribunal, and to such a case section 1343 of the Revised Statutes and A. W. 82 cannot constitutionally be applied. (31 Ops. Atty. Gen. 356.) (Dig. J. A. G. 1921, p. 31.)

F. Miscellaneous Crimes and Offenses

ART. 83. Military Property—Willful or Negligent Loss, Damage or Wrongful Disposition.—Any person subject to military law who willfully, or through neglect, suffers to be lost, spoiled, damaged, or wrongfully disposed of, any military property belonging to the United States shall make good the loss or damage and suffer such punishment as a court-martial may direct.

ART. 84. Waste or Unlawful Disposition of Military Property Issued to Soldiers.—Any soldier who sells or wrongfully disposes of or willfully or through neglect injures or loses any horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, shall be punished as a court-martial may direct.

ART. 85. Drunk on Duty.—Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall be punished as a court-martial may direct. Any person subject to military law, except an officer, who is found drunk on duty, shall be punished as a court-martial may direct.

ART. 86. Misbehavior of Sentinel.—Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall suffer any punishment, except death, that a court-martial may direct.

ART. 87. Personal Interest in Sale of Provisions.—Any officer commanding in any garrison, fort, barracks, camp, or other place where troops of the United States may be serving who, for his private advantage, lays any duty or imposition upon or is interested in the sale of any victuals or other necessaries of life brought into such garrison, fort, barracks, camp, or other place for the

use of troops, shall be dismissed from the service and suffer such other punishment as a court-martial may direct.

ART. 88. Intimidation of Persons Bringing Provisions.—Any person subject to military law who abuses, intimidates, does violence to, or wrongfully interferes with any person bringing provisions, supplies, or other necessaries to the camp, garrison, or quarters of the forces of the United States shall suffer such punishment as a court-martial may direct.

ART. 89. Good Order to be Maintained and Wrongs Redressed.—All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or wilfully destroys any property whatsoever (unless by order of his commanding officer), or commits any kind of depredation or riot, shall be punished as a court-martial may direct.

Any commanding officer who, upon complaint made to him, refuses or omits to see reparation made to the party injured, in so far as the offender's pay shall go toward such reparation, as provided for in article 105, shall be dismissed from the service, or otherwise punished, as a court-martial may direct.

ART. 90. Provoking Speeches or Gestures.—No person subject to military law shall use any reproachful or provoking speeches or gestures to another; and any person subject to military law who offends against the provisions of this article shall be punished as a court-martial may direct.

ART. 91. Dueling.—Any person subject to military law who fights or promotes or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall, if an officer, be dismissed from the service or suffer such other punishment as a court-martial may direct; and if any other person subject to military law, shall suffer such punishment as a court-martial may direct.

ART. 92. Murder—Rape.—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

ART. 93. Various Crimes.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, embezzlement, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.

ART. 94. Frauds Against the Government.—Any person subject to military law who makes or causes to be made any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

Who enters into an agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures, or advises the making or use of, any writing or other paper knowing the same to contain any false or fraudulent statements; or

Who, for the purpose of obtaining or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes or procures, or advises the making of, an oath to any fact or to any writing or other paper knowing such oath to be false; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures, or advises the forging or counterfeiting of any signature upon any writing or other paper, or uses, or procures, or advises the use of any such signature, knowing the same to be forged or counterfeited; or

Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or in-
212 tended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service thereof, makes or delivers to any person such writing, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States; or

Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof; or

Who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipment, ammunition; clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same:

Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties. And if any person being guilty of any of the offenses aforesaid while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed. And if any officer, being guilty, while in the military service of the United States, of embezzlement of ration savings, post exchange, company, or other like funds, or of embezzlement of money or other property intrusted to his charge by an enlisted man of men, receives his discharge, or is dismissed, or is dropped from the rolls, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not been so discharged, dismissed, or dropped from the rolls.

The provision of this article that any person guilty of an offense thereunder while in the military service is subject to arrest and trial by court-martial therefor after his discharge will not be held unconstitutional by a court of the first instance, in view of the fact that it has been in effect and enforced for sixty years. (Ex parte Joly, 290 Fed. 858.) (Dig. J. A. G. 1923, p. 99.)

ART. 95. Conduct Unbecoming an Officer and Gentleman.—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

Offenses under A. W. 95 and A. W. 96 are not the same, nor established by the same evidence, the former being applicable to officers and cadets; and the conviction of an officer under both articles on the same facts held not illegal as placing him twice in jeopardy for the same offense. (McRae v. Henkes, 278 Fed. 108.) (Dig. J. A. G. 1922, p. 118.)

ART. 96. General Article.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the direction of such court.

ART. 97. When and by Whom Ordered.—A court of inquiry to examine into the nature of any transaction of or accusation or imputation against any officer or soldier may be ordered by the President or by any commanding officer; but a court of inquiry shall not be ordered by any commanding officer except upon the request of the officer or soldier whose conduct is to be inquired into.

ART. 98. Composition.—A court of inquiry shall consist of three or more officers. For each court of inquiry the authority appointing the court shall appoint a recorder.

ART. 99. Challenge.—Members of a court of inquiry may be challenged by the party whose conduct is to be inquired into, but only for cause stated to the court. The court shall determine the relevancy and validity of any challenge, and shall not receive a challenge to more than one member at a time. The party whose conduct is being inquired into shall have the right to be represented before the court by counsel of his own selection, if such counsel be reasonably available.

ART. 100. Oath of Members and Recorders.—The recorder of a court of inquiry shall administer to the members the following oath: "You, A. B., do swear (or affirm) that you will well and truly examine and inquire, according to the evidence, into the matter now before you without partiality, favor, affection, prejudice, or hope of reward. So help you God." After which the president of the court shall administer to the recorder the following oath: "You, A. B., do swear (or affirm) that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God."

In case of affirmation the closing sentence of adjuration will be omitted.

ART. 101. Powers; Procedure.—A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to courts-martial and the trial judge advocate thereof. Such witnesses shall take the same oath or affirmation that is taken by witnesses before courts-martial. A reporter or an interpreter for a court of inquiry shall, before entering upon his duties, take the oath or affirmation required of a reporter or an interpreter for a court-martial. The party whose conduct is being inquired into or his counsel, if any, shall be permitted to examine and cross-examine witnesses so as fully to investigate the circumstances in question.

ART. 102. Opinion of Merits of Case.—A court of inquiry shall not give an opinion on the merits of the case inquired into unless specially ordered to do so.

ART. 103. Record of Proceedings—How Authenticated.—Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signature of the president and the recorder thereof, and be forwarded to the convening authority. In case the record can not be authenticated by the recorder, by reason of his death, disability, or absence, it shall be signed by the president and by one other member of the court.

V. MISCELLANEOUS PROVISIONS

ART. 104. Disciplinary Powers of Commanding Officers.—Under such regulations as the President may prescribe, the commanding officer of any detachment, company, or higher command may, for minor offenses, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges
214 for not exceeding one week, extra fatigue for not exceeding one week, restriction to certain specified limits for not exceeding one week, and hard labor without confinement for not exceeding one week, but shall not include forfeiture of pay or confinement under guard; except that in time of war or grave public emergency a commanding officer of the grade of brigadier general or of higher grade may, under the provisions of this article, also impose upon an officer of his command below the grade of a major a forfeiture of not more than one-half of such officer's monthly pay for one month. A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense, may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

ART. 105. Injuries to Property—Redress of.—Whenever complaint is made to any commanding officer that damage has been done to the property of any person or that his property has been wrongfully taken by persons subject to military law, such com-

plaint shall be investigated by a board consisting of any number of officers from one to three, which board shall be convened by the commanding officer and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be stopped against the pay of the offenders. And the order of such commanding officer directing stoppages herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the stoppages so ordered.

Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted as determined by the approved findings of the board.

Civilian employees of the Army within the territorial jurisdiction of the United States in time of peace are not "persons subject to military control" within the meaning of A. W. 2 and A. W. 105 and the stoppage of their pay to reimburse owners of private property for damages due to the fault or negligence of such civilian employees is not authorized. (8 Comp. Gen. 999.) (Dig. J. A. G. 1924, p. 38.)

A municipal corporation is, for civil purposes, deemed a "person" (United States v. Amedy, 11 Wheat. 392, 412) and is so considered within the meaning of A. W. 105. (Dig. J. A.G. 1919, p. 172.)

Insurance company has no right of subrogation. (Dig. J. A. G. 1922, p. 4.).

ART. 166. Arrest of Deserters by Civil Officials.—It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District, or possession of the United States, to arrest offenders, summarily to arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the United States.

215 ART. 107. Soldiers to Make Good Time Lost.—Every soldier who in an existing or subsequent enlistment deserts the service of the United States, or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the

trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve.

ART. 108. Soldiers—Separation From the Service.—No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial.

ART. 109. Oath of Enlistment.—At the time of his enlistment every soldier shall take the following oath or affirmation: "I, ——, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the rules and Articles of War." This oath or affirmation may be taken before any officer.

ART. 110. Certain Articles to be Read and Explained.—Articles 1, 2, and 29, 54 to 96, inclusive, and 104 to 109, inclusive, shall be read and explained to every soldier at the time of his enlistment or muster in, or within six days thereafter, and shall be read and explained once every six months to the soldiers of every garrison, regiment, or company in the service of the United States.

ART. 111. Copy of Record of Trial.—Every person tried by a general court-martial shall, on demand therefor, made by himself or by any person in his behalf, be entitled to a copy of the record of the trial.

ART. 112. Effects of Deceased Persons—Disposition of.—In case of the death of any person subject to military law the commanding officer of the place of command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters; and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all such effects, and said sum-

mary court shall have authority to collect and receive any debts due decedent's estate by local debtors and to pay the undisputed local creditors of decedent in so far as any money belonging to the deceased which may come into said summary court's possession under this article will permit, taking receipts therefor for file with said court's final report upon its transactions to the War Department; and as soon as practicable after the collection of such effects said summary court shall transmit such effects and any money collected, through the Quartermaster Department, at Government expense, to the widow or legal representative of the deceased, if such be found by said court, or to the son, daughter, father, provided the father has not abandoned the support
216 of his family, mother, brother, sister, or the next of kin in the order named, if such be found by said court, or the beneficiary named in the will of the deceased, if such be found by said court, and said court shall thereupon make to the War Department a full report of its transactions; but if there be none of the persons hereinabove named, or such persons or their addresses are not known to or readily ascertainable by said court, and the said court shall so find, said summary court shall have authority to convert into cash, by public or private sale, not earlier than thirty days after the death of the deceased, all effects of deceased except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valued chiefly as keepsakes; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposits, any will or other papers of value belonging to the deceased, any sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, together with an inventory of the effects secured by said summary court, and a full account of its transactions, to the War Department for transmission to the Auditor for the War Department for action as authorized by law in the settlement of accounts of deceased officers and enlisted men of the Army.

The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment.

ART. 113. Inquests.—When at any post, fort, camp, or other place garrisoned by the military forces of the United States and under the exclusive jurisdiction of the United States, any person shall have been found dead under circumstances which appear to require investigation, the commanding officer will designate and direct a summary court-martial to investigate the circumstances

attending the death; and, for this purpose, such summary court-martial shall have power to summon witnesses and examine them upon oath or affirmation. He shall promptly transmit to the post or other commander a report of his investigation and of his findings as to the cause of the death.

ART. 114. Authority to Administer Oaths.—Any judge advocate or acting judge advocate, the president of a general or special court-martial, any summary court-martial, the trial judge advocate or any assistant trial judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and in foreign places where the Army may be serving shall have the general powers of a notary public or of a consul of the United States in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law.

An assistant adjutant has no authority as such to administer oaths. (Dig. J. A. G. 1919, p. 135.)

ART. 15. Appointment of Reporters and Interpreters.—Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission and may set down the same, in the first instance, in shorthand. Under like regulations the president of a court-martial or military commission, or court of inquiry, or a summary court, may appoint an interpreter, who shall interpret for the court or commission.

ART. 116. Powers of Assistant Trial Judge Advocate and of Assistant Defense Counsel.—An assistant trial judge advocate of a general court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the trial judge advocate of the court. An assistant defense counsel shall be competent likewise to perform any duty devolved by law, regulation, or the custom of the service upon counsel for the accused.

ART. 117. Removal of Civil Suits.—When any civil or criminal prosecution is commenced in any court of a State against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under

any law of the United States respecting the military forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed in section 33 of the act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, and the cause shall thereupon be entered on the docket of said district court and shall proceed therein as if the cause had been originally commenced in said district court and the same proceedings had been taken in such suit or prosecution in said district court as shall have been had therein in said State court prior to its removal, and said district court shall have full power to hear and determine said cause.

ART. 118. Officers, Separation From Service.—No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction.

This article does not apply to warrant officers. (Dig. J. A. G., 1922, p. 49.)

ART. 119. Rank and Precedence Among Regulars, Militia, and Volunteers.—That in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade.

ART. 120. Command When Different Corps or Commands Happen to Join.—When different corps or commands of the military forces of the United States happen to join or do duty together, the officer highest in rank of the line of the Regular Army, Marine Corps, forces drafted or called into the service of the United States, or Volunteers, there on duty, shall, subject to the provisions of the last preceding article, command the whole and give orders for what is needful in the service, unless otherwise directed by the President.

ART. 121. Complaints of Wrongs.—Any officer or soldier who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to the general commanding in the locality where the officer against whom the complaint is made is stationed. The general

shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as
218 possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon.

SEC. 2. That the provisions of Chapter II of this act shall take effect and be in force eight months after the approval of this act: *Provided*, That articles 2, 23, and 45 shall take effect immediately.

SEC. 3. That all offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the taking effect of Chapter II of this act, under any law embraced in or modified, changed, or repealed by Chapter II of this act, may be prosecuted, punished, and enforced in the same manner and with the same effect as if this act had not been passed.

SEC. 4. That section 1342 of the Revised Statutes of the United States be, and the same is hereby, repealed, and all laws and parts of laws insofar as they are inconsistent with this act are hereby repealed.

219 *Respondent's Exhibit 10*

WAR DEPARTMENT

CONTINUOUS SECURITY DISTRICT OFFICE

904 Enquirer Building

CINCINNATI, OHIO

10 MAY 1943.

GUARD ORDER No. 1

To Auxiliary Military Police of This Plant:

1. Pursuant to the orders of the War Department, the guard forces at this plant were activated as Auxiliary Military Police, and for military purposes will be commanded, drilled, and instructed as military units.

2. All members of the guard force are subject to the Articles of War and may be court-martialed or otherwise punished for violations thereof.

3. A commissioned officer of the Army of the United States has been placed in command. Although in command at all times, this officer has not superseded the civilian guard officers and normally will exercise direct control only in matters relating to military instruction and duties as Auxiliary Military Police.

4. The mission of this guard force is to provide protection for this plant. In addition to its normal function, the force or any member thereof, whether on or off duty, is available for military use in any emergency, whether it be the result of flood, fire, or other disaster; internal disorders hazardous to the plant property or its production; or enemy action of any nature. *No conflicting*

interest of any kind will be permitted to interfere with the successful accomplishment of this mission.

5. The Government of the United States regards the protection of this plant and its production as essential in the successful prosecution of the war. The Auxiliary Military Police are ordered to provide this necessary protection and to ward off danger or threat of danger of any kind and from any source. If force must be used to accomplish this result, it will be used only to the extent reasonably necessary.

6. No member of the Auxiliary Military Police may resign without the written approval of the District Plant Guard Officer. Inattention to duty, failure to attend required instruction periods, and conduct unbecoming to the service may be cause for dismissal and the denial of a Certificate of Meritorious conduct.

For the Commanding Officer:

B. R. Wetenhall,
B. R. WETENHALL,
Captain, C. M. P.,
District Plant Guard Officer.

Approved:
(Signed)_____
Name in Type.
Title.
Plant.

220 *Respondent's Exhibit 11*

WAR DEPARTMENT
CONTINUOUS SECURITY DISTRICT OFFICE
904 Enquirer Building
CINCINNATI, OHIO

11 MAY 1943.

GUARD ORDER
No. 2

1. General Orders.—General Orders are those orders which apply to all posts. All Auxiliary Military Police members of plant guard forces are required to thoroughly understand the following listed General Orders.

2. When directed by proper authority to recite his General Orders a member of the Auxiliary Military Police replies substantially as follows:

My General Orders are:

(1) To take charge of this post and all plant and government property in view.

(2) To walk my post in a military manner, keeping always on the alert and observing everything that takes place within sight or hearing.

(3) To report all violations of orders I am instructed to enforce.

(4) To repeat all calls from posts more distant from the guardhouse than my own.

(5) To quit my post only when properly relieved.

(6) To receive, obey, and pass on to the guard who relieves me all orders from the plant official in charge of the Plant Guard Force, the Chief and non-commissioned officers of the guard.

(7) To talk to no one except in the line of duty.

(8) To give the alarm in case of fire or disorder.

(9) To call the Chief of the Guard in any case not covered by instructions.

(10) To salute all officers and all colors and standards not cased.

(11) To be especially watchful at night and during the time for challenging to challenge all persons on or near my post, and to allow no one to pass without proper authority.

(12) To allow no one to commit a nuisance on or near my post.

(13) To allow no one to enter upon plant property without proper authority.

(14) To detain all persons attempting to take photographs or make maps or sketches of the plant property without proper authority.

(15) To give no information concerning the plant or its business to anyone.

(16) To give first aid where necessary, and to direct injured persons, who can walk, to aid stations.

(17) To assist authorized persons to locate an area or gate or office to which they have been directed by proper authority.

(18) To allow no one to loiter on or near my post or the plant premises, and to detain all suspicious persons and call the Chief of the Guard.

By order of the Commanding Officer:

B. R. Wetenhall,
B. R. WETENHALL,
Capt., C. M. P.,
District Plant Guard Officer.

Approved:
(Signed) _____
Type Name.
Title.
Plant.

221 *Respondent's Exhibit 12*

All communications should be accompanied by carbon copy and addressed to

WAR DEPARTMENT
CONTINUOUS SECURITY DISTRICT OFFICE
904 Enquirer Building
CINCINNATI, OHIO

13 MAY 1943.

GUARD ORDER
No. 3

To All Auxiliary Military Police:

1. Each member of the Auxiliary Military Police is authorized to wear a service stripe for each six (6) months of service faithfully performed.

2. Service will begin with the date that the plant guard was inducted into the Auxiliary Military Police.

3. The service stripe will be in accordance with Army Regulations and will conform in material and color to the chevrons authorized to be worn by the Auxiliary Military Police in the Fifth Service Command.

4. The service stripe will not be furnished at government expense.

For the Commanding Officer:

B. R. Wetenhall;
B. R. WETENHALL;
Capt., CMP.
District Plant Guard Officer.

Approved:
(Signed) HAROLD R. SCHUMAN.
Type Name.
Title.
Plant.

Respondent's Exhibit 13

FM 21-100

WAR DEPARTMENT

BASIC FIELD MANUAL

SOLDIER'S HANDBOOK

July 23, 1941—Including C1, May 1, 1942

180. While you are off duty do not remove your clothing or equipment or leave the immediate vicinity of the guardhouse without permission of the commander of the guard. An emergency may occur when you will be needed at once.

181. When you are not posted as a sentinel or on other duty which requires you to carry your rifle, keep it in the arms rack in the guardhouse or in a stack.

182. Orders for sentinels are of two classes: general orders and special orders. General orders apply to all sentinels. Special orders apply to particular posts and duties. You must know and be able to recite the general orders before you go on guard duty. As soon as you are assigned to a relief and a particular post you must learn and be able to recite the special orders for that post. Whenever the officer of the day or the commander of the guard considers that a sentinel does not have sufficient instruction or is otherwise unfit for guard duty, he relieves him, sends him back to his organization, and notifies his organization commander.

183. The following are the general orders all sentinels are required to memorize. Learn them as soon as you can.

My general orders are—

1. To take charge of this post and all Government property in view.

2. To walk my post in a military manner, keeping always on the alert and observing everything that takes place within sight or hearing.

3. To report all violations of orders I am instructed to enforce.

4. To repeat all calls from posts more distant from the guard than my own.

5. To quit my post only when properly relieved.

6. To receive, obey, and pass on to the sentinel who relieves me all orders from the commanding officer, officer of the day, and officers and noncommissioned officers of the guard only.

7. To talk to no one except in line of duty.

8. To give the alarm in case of fire or disorder.

9. To call the corporal of the guard in any case not covered by instructions.

10. To salute all officers and all colors and standards not cased.

11. To be especially watchful at night and, during the time for challenging, to challenge all persons on or near my post, and to allow no one to pass without proper authority.

12. Guard duty is one of your most important duties. Remember that when you are posted as a sentinel you represent the commanding officer whose orders you are required to enforce, on and in the vicinity of your post. Upon the manner in which you perform your duties depends not only the enforcement of military law and orders, but also the security of persons and property under your charge. In time of war your responsibility as a member of the guard is greater than ever, for then the safety of your organization depends upon the manner in which you watch while your comrades rest. This is so important that sleeping on post by a sentinel or other improper performances of duty is punishable by a very severe court-martial sentence.

223

Respondent's Exhibit 14

This Identifies

Name Badge No.

AS AN EMPLOYEE OF

E. C. ATKINS AND COMPANY

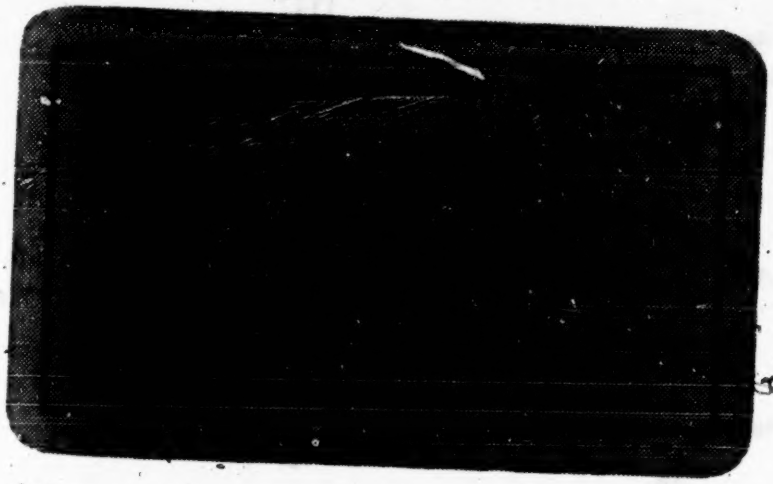
INDIANAPOLIS, INDIANA

Personnel Director

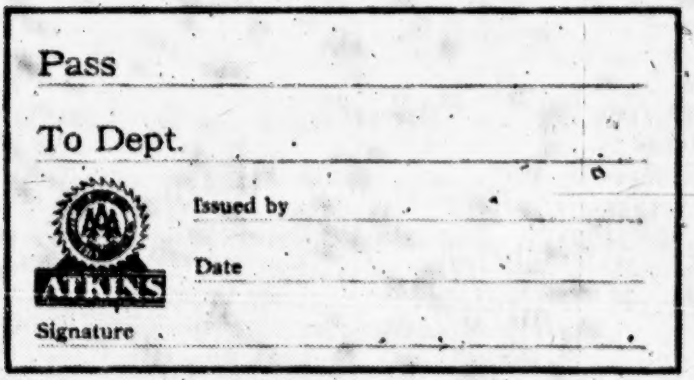
This Card Must Be Surrendered Upon Termination of Employment.

224

Respondent's Exhibit 15



225 *Respondent's Exhibit 16*



226 *Respondent's Exhibit 17*

COLLECTIVE BARGAINING AGREEMENT EXECUTED BY AND BETWEEN E. C. ATKINS AND COMPANY AND UNITED STEELWORKERS OF AMERICAN, LOCAL NO. 1543, AFFILIATED WITH THE C. I. O.

This Agreement, Dated and effective June 14, 1943, but actually executed June 14, 1943, by and between E. C. Atkins and Company, an Indiana corporation (hereinafter referred to as the "Employer"), Party of the First Part, and United Steelworkers of America, Local No. 1543, Affiliated with the C. I. O. (hereinafter referred to as the "Union"), Party of the Second Part, witnesseth that:

Whereas, the Employer and the Union have negotiated the terms and conditions of a Collective Bargaining Agreement, and desire to reduce the same to writing:

Now, therefore, the parties hereto enter into the following Articles of Agreement:

Section 1—Bargaining Unit, Reorganization and Co-Operation

(a) Bargaining Unit. It is hereby agreed that the unit appropriate for the purposes of collective bargaining, pursuant to the provisions of Section 9 (b) of the National Labor Relations
227 Act, is the unit consisting of all persons employed in the plants, shops, or yards of the Employer, except foremen and other supervisory officials, timekeepers and checkers, plant protection employees, journeymen sawsmiths, apprentice saw-

smiths, and brake press operators, painters, carpenters, and confidential salaried employees, including the South Illinois Street Plant and Fall Creek Ordnance Plant at Indianapolis, Indiana, and the Portland, Oregon, and Seattle, Washington, Plants, as established by the Decision and Direction of Election of the National Labor Relations Board, entered March 10, 1943, in a certain proceeding entitled "In the Matter of E. C. ATKINS & COMPANY and United Steelworkers of America, Local 1543, Affiliated with the C. I. O.," being Case No. R-4820, upon the docket of such Board, as affected and amended by supplements to such Decision entered March —, 1943 and April 15, 1943, such unit being hereinafter referred to as the "Appropriate Bargaining Unit." The term "employee," as used in this Agreement, shall include each and every member of the Appropriate Bargaining Unit.

(b) Designation of Union.—The collective bargaining negotiations between the Union and the Employer resulting in the negotiation and execution of this Collective Bargaining Agreement are conducted pursuant to the Decision of the National Labor Relations Board, as amended and supplemented, hereinabove referred to.

(c) Recognition.—The Employer hereby recognizes the Union as the Exclusive collective bargaining agency for all members of the Appropriate Bargaining Unit in respect to rates of pay, wages, hours of employment, or other conditions of employment; provided that any employee in such Appropriate Bargaining Unit shall have the right at any time to present grievances to the Employer. The Union and its Negotiating Committee, in conducting the negotiations resulting in the execution of this Collective Bargaining Agreement, hereby represent and warrant to the Employer that they have acted, and are acting, pursuant to the authority conferred as the exclusive collective bargaining agency for and in behalf of all members of the Appropriate Bargaining Unit, and with the intent that all members of the Appropriate Bargaining Unit shall be bounded by all the terms of this Collective Bargaining Agreement.

(d) Cooperation.—It is the intent and purpose of the parties to this Agreement to promote and improve industrial and economic relationships between the employees and the Employer, and to set forth herein the basic agreement governing rates of pay, wages, hours of employment, or other conditions of employment.

229 Section 2—Union Shop

All employees eligible shall become members of the Union within thirty (30) days after employment. The Employer shall have the exclusive right to determine the source or sources of applicants for employment, and shall be the sole judge of the requirements and qualifications of such applicants.

Section 3—Unfair Practices

(a) Covenant of the Employer.—The Employer agrees that it will comply with all provisions of the National Labor Relations Act, as amended from time to time, and will not engage in any one or more of the following Unfair Labor Practices listed in Section 8, clauses (1) to (5), both inclusive, of the National Labor Relations Act:

(i) Interfere with, restrain, or coerce employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of the Union, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

(ii) Dominate or interfere with the formation or administration of the Union, or any other organization of employees, or contribute financial or other support to it; provided that, subject to rules and regulations made and published by the National Labor Relations Board, the Employer shall not be prohibited from permitting employees to confer with it during working hours without loss of time or pay.

230 (iii) Discriminate in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in the Union, or any other organization of employees.

(iv) Discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the National Labor Relations Act.

(v) Refuse to bargain collectively with the Union; or lock out the employees; unless all the procedure relating to the settlement of grievances contained in Section 9 of this Agreement shall first have been followed, and the final decision pursuant to such procedure shall be against the Union. This clause of this Collective Bargaining Agreement is of the essence of the Agreement.

(b) Covenant of the Employees.—The Union agrees that no employees in the Appropriate Bargaining Unit will engage in any one or more of the following Unfair Labor Practices:

(i) Intimidate, restrain, or coerce employees, into membership in the Union.

(ii) Solicit employees, who are not eligible for membership in the Union during the working hours, either of the soliciting or solicited employee, or on the Employer's time.

(iii) Strike, walk out, picket, boycott, or take other individual or collective action to terminate the employment of the employees or any thereof, or to violate any of the terms of this Agreement, unless all the procedure relating to "Adjustment of Grievances" contained in Section 9 of this Agreement shall first have been followed, and the final decision pursuant to such procedure shall be against the Employer. This clause of this Collective Bargaining Agreement is of the essence of the Agreement.

231 Section 4—Wages

(a) The minimum hourly wage rate for employees of ninety (90) days or more seniority shall be 75¢ per hour.

The following minimum schedule shall be used for employees with ninety (90) days or less seniority:

New employees	65¢
Employees with thirty (30) days or more seniority	67½¢
Employees with sixty (60) days or more seniority	70¢
Employees with ninety (90) days or more seniority	75¢

(b) After thirty (30) days, new employees showing ability can qualify for actual operator's scale.

(c) The Union shall be informed of any individual change of wage rates at the following Committee meeting.

(d) Apprentices (newly hired) will draw 52½¢ per hour with a 2½¢ minimum increase per hour every six (6) months. Apprentices will receive as a bonus a $25.00 tool allowance at the end of each year served. Rates of apprentices now employed receiving less than this scale shall be adjusted accordingly.

(e) The eight-hour night shift that starts at 3:00 p. m. in the saw plant and 4:00 p. m. in the Armor Plate, shall be paid a 5% bonus on earnings. The eight-hour night shift that starts at 11:00 p. m. in the Saw plant and 12:00 p. m. in the Armor Plate shall be paid at 10% bonus on earnings. Swing shifts shall be paid at the 5% rate for work done before 11:00 p. m. or 12:00 p. m. as above, and at 10% rate for work done after 11:00 p. m. or 12:00 p. m. as above.

(f) In cases of break-down of machinery, employees shall be paid for all time lost in excess of thirty minutes at their regular rate of earnings.

(g) When piece-work jobs are timed, the operator shall receive his regular rate of earnings plus until the morning following the day checker receives rate sheet and operator is notified of same.

(h) All provisions of this Section 4 of this Agreement effecting an increase in wages shall be subject to approval by the National War Labor Board before becoming effective or being enforceable by either party hereto.

Section 5—Hours of Work

The work day shall consist of eight hours, and the work week shall be forty hours. Time and one-half shall be paid for all overtime in excess of eight hours in any one day or forty hours in any one week. All Sunday and holiday work shall be paid for at double time. No employee shall be paid for both daily and weekly overtime for the same hours so worked. Work on Saturday shall be paid for at the rate of time and one-half.

The calendar work day shall consist of a twenty-four hour period beginning at 7:00 a. m. in the old plant.

233 The calendar work day shall consist of a twenty-four hour period starting at 8:00 A. M. in the Armor Plate Division.

For the duration of the war, straight time shall be paid for work done on Sundays and holidays if they fall within the forty-hour week. Work in excess of forty hours will be paid for at time and one-half, and double time will be paid for any seventh consecutive day.

Section 6—Vacations

Employees who prior to July 1, 1942, have a cumulative service of from one to five years, inclusive, shall receive one week's vacation with pay in advance. Employees with six years' service shall receive one week and one day; employees with seven years' service, one week and two days; employees with eight years' service, one week and three days; employees with nine years' service, one week and four days; employees with ten years' service, one week and five days or two weeks' vacation. Such vacations to be taken in a single period.

Pay for vacation shall be based on average rate of earnings per hour of base period of first three months' quarter of the year. The total hours of such pay shall be the average hours worked per week during the period of two weeks ending one week
234 previous to vacations but not less than forty (40) hours per week of vacations.

Section 7—Seniority

It is understood that in all cases of promotion, increase or decrease of forces, length of cumulative service shall govern, provided the employee has the ability to perform the work to which he is transferred or is familiar with the job in question. If pro-

duction decreases occur affecting departmental or individual employment, such notice shall be given the affected party or parties one week in advance of any lay-off procedure. Notification of such action shall also be supplied the Grievance Committee.

Former employees where service was less than six (6) months, who for any reasons have not been on the pay roll for one year prior to reemployment, shall return to work as new employees.

Cases of disputes involving ability shall be considered only when there is a difference of three months or less of seniority.

Seniority of all new employees shall be established after six months' service and will revert back to date of employment.

A plant seniority list will be supplied the Grievance Committee. A department seniority list will be supplied the foreman and steward of each department. These seniority lists will be revised quarterly.

Section 8—War Clauses

In case employees are drafted or volunteer for military service, the Employer agrees to retain employment for those so called to the service of their Country without interruption of seniority. Men employed in their places during their absence shall be replaced by returning service men—provided they are physically able to resume work.

Employees entering military service after the first of the year, who have one year or more actual service when called, shall be eligible for vacation pay and draw same when leaving for service.

Section 9—Adjustment of Grievances

In event any difference, disagreement, or dispute (hereinafter referred to as a "grievance") arises as to the interpretation, application or performance of this Agreement by the Employer, or the rights of the Union, or any employee thereunder, the employees agree to take none of the action prohibited by the terms of Section 3, clause (b), subclause (v) of this Agreement, unless an earnest effort has been made to settle such grievance in the following manner:

First, between the aggrieved employee and the foreman of the department involved;

Second, between a member or members of the Grievance Committee, designated by the Union, and the Personnel Director;

Third, between a member or members of the Grievance Committee, designated by the Union, and the General Superintendent or Manager of the Plant:

Fourth, between the representatives of the National Organization of the Union and Representatives of the Employer;

Fifth, in the event the dispute shall not have been satisfactorily settled, the matter shall then be appealed to an impartial umpire to be appointed by mutual agreement of the parties hereto. The decision of the umpire shall be final. The expense and salary incident to the services of the umpire shall be paid jointly by the Employer and the Union.

"Grievances will be discussed by the Personnel Director with the Grievance Committee weekly on Wednesday at 4:00 P. M.; provided that in any case the Personnel Director shall have at least 72 hours' time after the filing of a statement of grievance to investigate the facts connected therewith prior to the discussion of such grievance with the Grievance Committee."

All cases presented by the Grievance Committee shall be reported back by the Employer within seven (7) days; the Union agrees not to present more than four major time study cases at any one Grievance Committee-Management weekly conference.

The Grievance Committee for the plant shall consist of not less than three employees of the Plant, and not more than ten such employees designated by the Union, who will be afforded such time off, without pay as may be required.

First, to attend regularly scheduled committee meetings;

Second, to attend meetings pertaining to discharges or other matters which cannot reasonably be delayed until the time of the next regular meeting; and

Third, any member of the Grievance Committee or officer of the Union shall have the right to visit departments other than his own at all reasonable times for the purpose of transacting the legitimate business of the Union, after notice to and permission from his department supervisor or foreman.

The actual number of members of the Grievance Committee at the plant shall be mutually agreed upon between the General Superintendent or Manager of the plant and the Union, and in no case shall there be more than one member from any department.

The aggrieved employee, witness or foreman may be called into a Grievance meeting upon request of the Grievance Committee by mutual agreement between the Employer and the Grievance Committee.

Any decision reached with the Management shall stand until the Grievance Committee is recalled to reconsider any case altered by circumstances.

Section 10—Management

The Management of the plant and the direction of working forces, including the right to hire, suspend or discharge, for

proper cause, or transfer, and the right to relieve employees from duty because of lack of work, or for other legitimate reasons is vested exclusively in the Employer.

Section 11—Discharge Cases

In the event that a member of the Union shall be discharged from Employment from and after the date hereof, and he believes that he has been unjustly dealt with, such discharge shall constitute a case arising under the method of adjusting grievances herein provided. In the event it should be decided under the rules of this Agreement that an injustice has been dealt the employee with regard to the discharge, the Employer shall reinstate such employee and pay full compensation at the employee's regular rate for the time lost. All such cases of discharge shall be taken up and disposed of within five days from date of discharge. In exceptional cases, longer time shall be granted.

Section 12—Safety and Health

The employer shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment. Protective devices, wearing apparel and other equipment necessary to protect properly employees from injury shall be provided by the Employer in accordance with the practice now prevailing. Proper heating and ventilating systems shall be installed where needed.

Section 13—Individual Wage Rates

Where alleged inequalities in wage rates prevail the matter may be taken up for local plant adjustment and settlement made between the Union and Management on a mutually satisfactory basis.

Section 14—Holidays

The following days shall be considered holidays during which days there shall be no regular production work, except in cases of continuous operations: New Years Day, Decoration Day, Fourth of July, Labor Day, Thanksgiving, Christmas.

Section 15—Reporting Pay

Employees will be notified at the close of the day or night shift whether or not they will work the following day. If not, and the employee reports for work, he or she will be paid for three hours' work at least at his or her average rate of pay, unless he refuses such work as may be provided.

Section 16—Lay-offs and Bulletin Boards

When it is necessary to reduce forces, seniority shall be adhered to except in special cases agreed upon by the Employer and the Union. Before laying off employees with one year or more seniority the workweek shall be reduced to thirty-two (32) hours.

Three bulletin boards will be provided for the exclusive use of the Union for posting notices of official business.

240 Section 17—Protective Seniority

Beginning July 1, 1942, all elective representatives of the Union shall not be laid off during term of offices.

Section 18—Termination Provisions and Future Conferences

The agreement shall remain in full force and effect unless changed or terminated in accordance with provisions hereinafter stated. Either party may, subsequent to the date of this Agreement, at any time or from time to time, given ten days' written notice, by registered mail, to the other party of the time for commencement of a conference of the parties for the purpose of negotiating the terms and conditions of changes of this Agreement, which conferences shall be at the office of the Company in Indianapolis, Indiana, unless otherwise mutually agreed; and if, because of failure to agree, this Agreement is not changed by written agreement entered into between the Company and the Union within thirty (30) days from the giving of said notice, then this Agreement and all provisions thereof shall terminate upon the expiration of thirty (30) days from the giving of said notice.

This contract covers the same personnel classifications employed at Portland, Oregon, and Seattle, Washington, except Sawsmiths which are included and covered by terms of this Agreement.

241 Section 19—Assigns to Be Bound

During the period of this agreement, as extended from time to time, it shall be binding upon, and inure to the benefit of, the successors and assigns of the parties hereto.

Section 20—Warranty of Union

The Union hereby warrants that it represents a majority of the employees of the Employer in the Appropriate Bargaining Unit, and that such majority is, at the time of the execution of this Agreement, composed of members in good standing of the Union.

Executed the day and year hereinabove first mentioned by the parties hereto.

E. C. Atkins and Company, by Henry C. Atkins, Jr., Gen.
242 Supt., "Employer," Party of the First Part; United Steelworkers of America, Local No. 1545, Affiliated With the C. I. O., by Harry O. Dougherty, President; by B. Lee Fischer, by Emerson Baker, by George Church, by John R. Bradshaw, by B. B. Chambers, by Fred G. Reeves, by Norman Ruby, by Louis Jones, by Philip Murray, President, N. S. A.; by David J. McDonald, Secretary-Treasurer, U. S. A.; by James Robb, Director, District No. 30, U. S. A., "Union," Party of the Second Part.

243 *Respondent's Exhibit 18*

AGREEMENT

SECTION 1. This agreement entered into this first (1) day of July 1940 by and between E. C. Atkins & Co., hereinafter referred to as the Employer, and Saw Smiths' Local Union No. 18548, known as Anvil Men, affiliated with the American Federation of Labor, hereinafter referred to as the Union, representing all Employees in Indianapolis who are Anvil Men.

SECTION 2. The Employer agrees to employ only Saw Smiths in good standing with the Union, and the Union agrees to furnish the Employer with a sufficient number of competent workers (if available) whenever called upon to do so. This Union Recognized as Federal Labor Union No. 18548 reserves the right to accept or reject any journeymen anvil man. In case of rejection this Union can reserve the right not to work with him.

SECTION 3. One Dollar ($1.00) an hour shall constitute the minimum rate of wages for any one hour's day work or piece work. Where existing wage rates are paid the Employe in excess of the scale herein provided, said scale shall remain at the highest rate and nothing herein contained shall be construed to permit reduction in such higher rate of pay.

SECTION 4. Eight (8) hours shall constitute a day's work and forty (40) hours shall constitute a week's work, with time and one-half for all time worked in excess of these hours. All work done on Saturday shall be considered overtime. Double time for all work done on Sunday and all legal holidays.

SECTION 5. Each apprentice now working shall be required to serve four (4) years on the anvil at day work, and in no way will he be considered a journeyman until he has completed his specified four (4) years. He shall at no time be given preference over a journeyman. There shall be no apprentices put on the anvil during the life of this contract.

SECTION 6. There shall be no discrimination against age or ability. In event there is, it shall be referred to the grievance committee.

SECTION 7. Each anvil man, after having served one (1) year of accumulated service with E. C. Atkins & Co., shall receive one week's vacation with pay.

244 SECTION 8. This Agreement shall be and remain in full force and effect from this date until one (1) year from date of signing of this contract, and shall continue in effect annually thereafter unless thirty (30) days' notice in writing is submitted prior to the expiration of this agreement of any desire to change or amend same. It is agreed, however, that this contract may be opened at the request of the Union thirty days after the signing of this agreement for the question of wages.

E. C. ATKINS AND COMPANY,
HENRY C. ATKINS, JR., *Supt.*

SAW SMITH'S FEDERAL LABOR UNION, No. 18548,
CHAS. SHARPE, JR., *President.*
EDDIE VESPO, *Secretary.*
HENRY H. LOTT, *Treasurer.*
AMERICAN FEDERATION OF LABOR,
HUGH GORMLEY,
Gen. Representative.

245. *Respondent's Exhibit 19*

ADDENDUM TO AGREEMENT ENTERED INTO ON JULY 1ST, 1940, BETWEEN E. C. ATKINS AND COMPANY AND THE SAWSMITHS' LOCAL UNION NO. 18548

This instrument shall be entitled an "Addendum to Agreement" and shall be considered to be, and is, a part of the agreement entered into on July 1st, 1940, between E. C. Atkins and Company and the Sawsmiths' Local Union No. 18548.

Whereas, each and all of the members of the Union stand ready and willing to do their share, and their all, to work, including long hours, to aid, assist and cooperate with the E. C. Atkins and Company to the end that it may satisfactorily, efficiently and timely do its alloted task in National Defense; and

Now, therefore, it is hereby mutually agreed by and between the Union and the Employer, that:

SECTION I. The Union agrees to the training and use of Break. Press Operators during the present emergency war period.

SECTION II. Said men will be under the jurisdiction of the Sawsmiths' Local Union No. 18548, and said Union will issue work permits to those so employed. The Union and Company will de-

termine the rate of pay at a later date. The Company agrees not to use said break press operators on anvil, slab, rolls or as journeymen sawsmiths.

SECTION III. The Company further agrees that when sawmakers are not working forty-eight (48) hours per week in the saw and armor plate production said sawsmiths shall work on presses in place of permit men; this in accordance with seniority as agreed to by Union and employer.

SECTION IV. This Company agrees that not less than nine (9) sawsmiths shall be retained in the Armor Plate Division at all times. If any change desired, this will be taken up between the Company and the Union.

SECTION V. Break press operators shall not be put on production work until sawsmiths who are able are working forty-eight (48) hours per week.

SECTION VI. The Company agrees to the following plan: That all journeymen sawsmiths who have one (1) to five (5) years' service, inclusive, as of July 1st, 1942, shall receive one (1) week paid vacation; sawsmiths having six (6) years' service, one week and one day paid vacation; sawsmiths having seven (7) years' service, one week and two days' paid vacation; sawsmiths having eight (8) years' service, shall receive one week and three days' paid vacation; sawsmiths having nine (9) years' service shall receive one week and four days' paid vacation; sawsmiths having ten (10) years' service or over, shall receive two weeks' paid vacation.

Vacations will so far as possible be granted at times most desired by employees, providing it does not interfere with efficient operation of their department.

SECTION VII. The Company agrees that effective August 24, the rate of pay for journeymen sawsmiths shall be One Dollar and Sixty Five Cents ($1.65) per hour and that all bonus and piece work shall be eliminated.

The Union agrees that if the above rate of pay is installed the present individual production shall be maintained. The Management to be the judge of satisfactory performance.

In witness whereof, the parties hereunto subscribed their names this 11 day of September 1942.

E. C. ATKINS AND COMPANY,
By HENRY C. ATKINS, JR.,
General Superintendent.

AMERICAN FEDERATION OF LABOR,
By HUGH GORMLEY,
General Representative.

SAWSMITHS LOCAL UNION NO. 18548,
By CHARLES SCHAEFER, JR.

247 *Respondent's Exhibit 20*

ADDENDUM TO AGREEMENT ENTERED INTO ON JULY 1ST, 1940 BETWEEN E. C. ATKINS AND COMPANY AND THE SAWSMITH'S LOCAL UNION NO. 18548

Memo Agreement—March 5, 1942

It is hereby agreed between E. C. Atkins and Company and the Sawsmith's Local Union No. 18548, that beginning as of this date the following will take place:

The Company will agree to take the equivalent of one Sawmaker from each department to be put on the Break Presses in addition to the Sawmakers now working on these Break Presses.

It is agreed that this trial period will consist of 30 days, but that if at any time during the 30 days, it is definitely shown that the Sawmakers cannot maintain and keep up with production, then the Sawmakers will agree to see that help is hired according to agreement by the Company as provided in the agreement dated July 1st, 1940.

In witness whereof, the parties have hereunto subscribed their names this 5th day of March 1942.

AMERICAN FEDERATION OF LABOR,
By HUGH GORMLEY, *General Representative.*
SAWSMITH'S LOCAL UNION NO. 18548,
By CHAS. SCHAEFER.
E. C. ATKINS AND COMPANY,
By HENRY G. ATKINS, JR.
U. S. DEPARTMENT OF LABOR,
By OWEN SIMMONS, JR.

218 *Respondent's Exhibit 21*

THIS IDENTIFIES

Cyrus Elvin Wood — NAME

Personnel — BADGE NO.

AS AN EMPLOYEE OF

E. C. ATKINS AND COMPANY

INDIANAPOLIS, INDIANA

FALLCREEK ORDNANCE PLANT

Cyrus E. Wood

PERSONNEL DIRECTOR

This Card Must Be Surrendered Upon Termination of Employment

DATE EMPLOYED October 6, 1[illegible]

AGE	WEIGHT	HEIGHT	EYES	HAIR
51	195	6'	Bl	Grey

FINGERPRINT LEFT. INDEX

FINGERPRINT RIGHT INDEX

249 *Respondent's Exhibit 22*

NATIONAL DEFENSE PROGRAM

FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

APPLICANT

Name of contributor _____ City _____ State _____
(State whether Police Department, Sheriff's Office, or other official designation)

(Please paste photo here)
(Use optional)

Applicant for _____
(Specify position)

Name of company _____
Date _____
Address _____
Birthplace _____ Citizenship _____
Age _____ Date of birth _____
Height _____ Weight _____
Hair _____ Eyes _____
Complexion _____ Build _____
Scars and marks _____

IMPORTANT—PLEASE INCLUDE ALL REQUESTED DATA

250 NATIONAL DEFENSE PROGRAM

Leave this space blank

Name _____ Classification _____
(Surname) (First) (Middle)

(Please Type or Print Plainly)

No. _____ Color _____ Sex _____ Reference _____

RIGHT HAND

1. Thumb	2. Index finger	3. Middle finger	4. Ring finger	5. Little finger.

LEFT HAND

6. Thumb	7. Index finger	8. Middle finger	9. Ring finger	10. Little finger

Impressions taken by: _____ Note amputations

(Signature of official taking prints)

Date impressions taken _____ (Applicant's signature)

Four fingers taken simultaneously			Four fingers taken simultaneously
Left hand	Left thumb	Right thumb	Right hand

PLEASE DO NOT FOLD THIS CARD

251 *Respondent's Exhibit 23.*

INDIANAPOLIS POLICE DEPARTMENT FOR PERSONAL IDENTIFICATION OF APPLICANT

Name of contributor _____ City _____ State _____

(State whether Police Department, Sheriff's Office, or other official designation)

(Please paste photo here)
(Use optional)

Applicant for _____
(Specify position)

Name of company _____

Date _____

Address _____

Birthplace _____ Citizenship _____

Age _____ Date of birth _____

Height _____ Weight _____

Hair _____ Eyes _____

Complexion _____ Build _____

Scars and marks _____

IMPORTANT—PLEASE INCLUDE ALL REQUESTED DATA

252

Leave this space blank

Name _____ Classification _____
(Surname) (First) (Middle)

(Please Type or Print Plainly)

No. _____ Color _____ Sex _____ Reference _____

RIGHT HAND

1. Thumb	2. Index finger	3. Middle finger	4. Ring finger	5. Little finger

LEFT HAND

6. Thumb	7. Index finger	8. Middle finger	9. Ring finger	10. Little finger

Impressions taken by: (Signature of official taking prints)	Note amputations		(Applicant's signature)
Date impressions taken			
Four fingers taken simultaneously			Four fingers taken simultaneously
Left hand	Left thumb	Right thumb	Right hand

PLEASE DO NOT FOLD THIS CARD

253 *Petitioner's Exhibit 1*

CONSTITUTION OF THE GRAND LODGE, DISTRICT AND LOCAL LODGES

International Association of Machinists

Amended by Referendum Vote, July, 1934, effective October 1, 1934. Amended by Referendum Vote, July, 1935, effective October 1, 1935. Revised by Committee on Law as recommended by the Nineteenth Convention of the International Association of Machinists, held in the City of Milwaukee, Wis., September 21 to October 2, 1936, and thereafter adopted by Referendum Vote in the month of December, 1936, effective April 1, 1937. Revised by Committee on Law as recommended by the Twentieth Convention, held in the City of Cleveland, Ohio, September 16 to September 27, 1940, and thereafter adopted by referendum vote in the month of December, 1940, effective April 1, 1941. Amended by referendum vote, January, 1942, effective April 1, 1942. (See page 100.)

INTERNATIONAL ASSOCIATION OF MACHINISTS

Machinists' Building

WASHINGTON, D. C.

254 Constitution of the Grand Lodge, District and Local Lodges of the International Association of Machinists, amended by referendum vote July, 1934; effective October 1, 1934; amended by referendum vote July, 1935; effective October 1, 1935. Revised by committee on law as recommended by the nineteenth convention of the International Association of Machinists, held in the city of Milwaukee, Wis., September 21 to October 2, 1936, and thereafter adopted by referendum vote in the month of December, 1936; effective April 1, 1937. Revised by committee on law as recommended by the twentieth convention, held in the city of Cleveland, Ohio, September 16 to September 27, 1940, and thereafter adopted by referendum vote in the month of December, 1940, effective April 1, 1941. Amended by referendum vote, January, 1942, effective April 1, 1942. (See page 100.)

ORDER OF BUSINESS OF GRAND LODGE

1. Report of Committee on Credentials.
2. Roll call of members.
3. Reading of the Minutes.
4. Report of Officers, commencing with I. P.
5. Reports and petitions of Local Unions.
6. Reports of special committees.
7. Receiving communications and bills.
8. Unfinished business.
9. New business.
10. Good and welfare.

255 PREAMBLE

Believing that the right of those who toil to enjoy to the full extent the wealth created by their labor is a natural right and realizing that under the changing industrial conditions incident to the enormous growth of syndicates and other aggregations of capital it is impossible for those who toil to obtain the full reward of their labor other than through united action; and recognizing the fact that those who toil should use their rights of citizenship intelligently, through organizations founded upon the class struggle and acting along co-operative, economic and political lines, using the natural resources, means of production and distribution for the benefit of all the people, with the view of restoring the commonwealth to all those performing useful service to society;

Now, therefore; we, the International Association of Machinists, pledge ourselves to labor unitedly in behalf of the principles herein set forth, to perpetuate our Association on the basis of solidarity and justice, to expound its objects, to labor for the general adoption of its principles, to consistently endeavor to bring about a higher standard of living among the toiling masses.

256 PLATFORM

The Grand Lodge of The International Association of Machinists aims:

1. To bring within the organization all employees, male and female, who are actively engaged in or connected with the Machinists trade, to foster in their hearts the spirit of mutual helpfulness, and to impress them with their obligation to do their best for the welfare of each member and for the Association as a whole.

2. To adopt and put into active operation an effective plan to stabilize employment for all the members of our Association.

3. To secure the establishment of a legal apprenticeship system of four (4) years.

4. To impress upon all employers the necessity of paying the full current wages weekly, giving preference in employment to members of organized labor, and abolishing personal record, physical examination, and old-age limits imposed by employers.

5. To settle all disputes arising between our members and employers, by direct negotiation whenever possible, and in cases where Arbitration is resorted to, to reserve our freedom to accept or reject the decision rendered except in those cases where it is previously agreed by both parties that the decision shall be binding.

6. To shorten the hours of Labor to thirty per week, namely five days of six hours per day; Saturday to be a holiday. To establish the principle of paid vacations, and extra pay for night work and to maintain for our members a cultural standard of living guaranteed by an adequate annual income.

7. To adopt and advocate a plan of cooperation with other kindred crafts, thereby eliminating strikes of one organization at a time, and by concerted action making it possible for all to reap the full benefit of their labor.

8. To stimulate the political education of the members to understand their political rights and use the ballot intelligently, to the end that the Government may be a government for, of, and by the people, and not to be used as a tool to further the ends of combinations of capital for its own aggrandizement.

9. To urge the membership to vote only for and support candidates who are in favor of this platform and the following political demands: Initiative, Referendum and Recall, National Income Tax Law, National Inheritance Tax Law, National and State Employers' Liability Law; all judges, without exception, to be elected

by vote of the people; national law granting pensions for old age or total disability and accident benefits; public ownership of all public utilities; woman suffrage; change of the Constitution of the United States or any country under our jurisdiction which now declares these subjects or questions to be unconstitutional; self-government of cities; abolition of contract system on all public work—city, county, state, or national—such work to be done on the day-labor plan at union wages.

257 10. That no inferior Federal judge shall set aside a law of Congress on the ground that it is unconstitutional. That if the Supreme Court assumes to decide any law of Congress unconstitutional or by interpretation undertakes to assert a public policy at variance with the statutory declaration of Congress, which alone under our system is authorized to determine the public policies of government, the Congress may by repassing the law nullify the action of the court. Thereafter the law to remain in full force and effect precisely the same as though the court had never held it to be unconstitutional.

11. The labor of a human being not being property, we demand the abolition of the use of injunctions in labor disputes on the grounds that it is a judicial usurpation of the constitutional rights of our citizens.

258 JURISDICTION OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS

The Jurisdiction of the International Association of Machinists includes any person who has served an apprenticeship of four years at the machinist trade, or who has acquired a fundamental knowledge of shaping, sizing, turning, boring, fitting, riveting, the operating of electric, thermit and oxy-actylene welding apparatus and the adjusting of metal parts of machinery of any character, whether such metal be steel, iron, brass, lead, copper, aluminum, duralumin, bronze, or any other substitute used therefor; as well as any person who may have worked at the trade four years either as a vice hand, lathe hand, planer hand, slotting machine hand, shaper hand, milling machine hand, horizontal or vertical boring mill hand, screw machine hand, operators of Gisholt, Jones and Lamson and all other turret lathes, and gear cutters and all other machine tools. Floor hands, machine adjusters, millwrights or general erectors of machinery, jig, die, tool and mold makers, metal pattern makers, Diesel Oil and Electric machinists. The operating of electric, gas and other mechanical cranes and conveyors used in connection with machinists' work. Mechanical chauffeurs who are required to make repairs to their equipment. Sewing and knitting machine adjusters and adjusters of all kinds of automatic, semiautomatic, and self-contained machinery. Fitting together and installing valves of all kinds and flange work on high pressure piping. Automobile, aircraft and moving picture machinery builders, and repairmen.

Classification of Work Included

The making, erecting, assembling, installing, maintaining, repairing or dismantling of all or any parts thereof of all machinery, engines, motors, pumps, Diesel, and all other metal power devices, either transmission, excavating, elevating, shooting or conveying; whether driven by hand, foot, steam, electricity, gas, gasoline, naptha, benzol, oil, air, water or other power, including all metal appurtenances therto, composed of steel or iron, whether structural, angle, T, boiler, galvanized, ornamental, cast malleable, bar, tube, pipe, rod, shafting, sheet or plate; or of nickel, bronze, tin, lead, copper, brass, aluminum, babbitt or other metal substitute therefor.

The manufacture and installation of all machine tools. The operation of all machines used in the manufacture of machine-finished metal parts and devices and all bench and vice work pertaining thereto, and all machinists' work on steam, gas, gasoline, naptha, benzol, oil, air, and water-tight work.

All riveting, caulking, cutting, chipping, patching, grinding, turning, sizing, boring, fitting, laying out, shaping and drilling pertaining to machinists' work. All drilling, cutting and tapping in boilers, tanks, drums, frames or other structures required for engine and machinery attachments, mountings, or other metal construction and installation.

All oxy-acetylene, electric, oil or thermit welding when used to substitute the former method of performing new or repair work, including dismantling. All lubricating devices, injectors, and inspirators and parts thereof, and attachments thereto. All devices used in the transmission of power except electric wiring, this to include all line and countershafting, shaft hangars, sheaves and pulleys.

All instrument, gauge tool and die making, metal mold, novelty, model and metal pattern making and die sinking; the making of jigs, templets, spiral and coil springs, and all molds for the shaping of glassware.

The manufacture and installation of all printing, paper and pulp-making machinery. The manufacture and installation of all brewery machinery, including all soakers, pasteurizers, bottle washers, crowning machines, bottle-filling devices and conveyors. The manufacture and installation of all factory, mill and laundry machinery.

The manufacture and repair of all counting, recording, and correspondence devices, such as cash registers, typewriters, adding machines, sealing and addressing devices and all other office machinery.

The manufacture, repairing and maintaining of all automobiles, trucks, busses, tractors, firearms, fire engines, locomotives, hydroplanes and aeroplanes, agricultural machinery and mining machinery, rock drills and pneumatic devices used as hand tools

or for the transmission of power. The manufacture and installation of all ice making and refrigerating machinery. The manufacture and installation of all abattoir, bakery and confectionary machinery, textile, carding and gin machinery, refining machinery, and machinery used in reducing plants, rock-crushing and quarry machinery, concrete mixers and cement mill machinery, rolling mill and steel converting machinery, loading and unloading machinery and traveling roadways.

The manufacture, installation, repairing and maintaining of all machines used in making malt, cans, nails, pottery, horseshoes, brick, shoes, hats, clothing, pianos, organs, musical and surgical instruments, tobacco, cigarettes and cigars, flour, cereals and all other products, where mechanical devices are necessary for the making.

The manufacture and installation of all automatic stokers, all mechanical devices used in amusement parks, all dredging machinery, and all hoists, elevators, lower-atoms, escalators, derricks and other lifting or hoisting devices.

The inspection of all machinery, ordnance, and engines, including locomotives, and the operating of all power machinery during the period of control or until accepted by the purchaser.

The manufacture, installation, repair and maintenance of all air conditioning plants and equipment.

And all work connected with dynamometer cars, and building, repairing, setting up, inspecting and maintaining of all classes of scales.

The operation and repairing of towing and coaling machinery in the Panama Canal Zone.

Marine Work

All marine work as follows:

The installing, assembling, dismantling and repairing of all engines, pumps, dynamos, refrigerating machinery, steering gear, winches, windlasses, capstans or other devices used in handling the ship.

The removing and replacing of the rudder, propeller shaft and propeller wheel and the placing of all deck fittings and mast fittings, including mast headlights.

The installing and repairing of all condensers, evaporators, feed-water heaters, overhauling and repairing of
261 all valves, either steam, water, air, gas, oil, or other liquids and strainers attached to hull.

The installation of all pipes, pipe hangers, valves, and fittings for engines, boilers, ice machines, evaporator plants, telemotors, air compressors, and power pumps.

The instalaltion of deck operating gear for all valves.

The boring, facing, chasing or tapping and drilling holes for bolts of all pipe flanges.

The bending, threading, and installing of tubes in boilers in which threaded tubes are used.

The bending, welding, and installation of heater coils used for fuel oil tanks, or heating purposes.

The installation of all condenser and feed-water heater tubes, whether rolled, screwed, or ferruled.

The installation of all tubes in oil heaters and coolers, except those under jurisdiction of the coppersmiths.

The instalaltion of all gratings, ladders and hand rails, port lights, ventilator operating gear and watertight doors.

Electric and Internal Combustion Engines and Cars

The building, installation, inspection, adjusting, maintaining, removal and overhauling of pantographs and trolley poles shall be machinists' work, including the building of pantograph shoes and replacement of same whether the pantograph is on or off locomotive and the changing of insulated support brackets, lathe and other machine work.

The assembling, installing, inspecting, maintaining, removing and overhauling of all parts of the main and braking controllers with the exception of insulating materials, leads and wires.

The removing, dismantling, overhauling, assembling, installing, inspecting and maintaining of all air cylinders, magnet valves, cam shafts, bearings, rollers, castings, adjustment springs and metal housings used in the construction and operation of reverser switches, series parallel switches, transfer switches, group switches and contractors.

The assembling, installing, inspecting and maintaining of all mechanical parts of main and auxiliary switches and ground switches.

262 The assembling, installing, maintaining, inspecting, and overhauling of clutch and gear assembly on motor operated rheostats.

The assembling, installing, inspecting, maintaining, dismantling and overhauling of traction motors, blower motors, heater motors, rheostat motors, air compressor motors, motor generator sets, axle genegators, control generators and slip rings (excluding field coils, insulators and electrical connections); the assembling, finishing either by hand or bench work, drilling, tapping, and bolting of pole pieces: the dismantling, repairing and assembling of brush holders; the drilling, tapping and repairing of brush holder studs; the fitting of all metal parts of commutators, including segments; the turning and machine slotting of all commutators whether done in lathe or in armature housing; the pressing in and out of armature shafts; the machining, repairing and fitting of armature cores; the repairing and fitting of all covers for motors, housings and compartments.

The installing, inspecting, adjusting, removing and repairing of air compressor governors.

The grinding, filing and repairing of grids and the installing and removal of grid banks, with the exception of making and breaking electrical connections.

The removing and installing of electric cab heaters and the removal and application of covers to same where they are retained by cap screws or tap bolts; the removing and installing of headlight cages; the removing, repairing, installing and maintaining of electro-pneumatic pantograph valves, sander valves, regenerative interlock valves and automatic control switches with the exception of electric contacts and wiring, shall be machinists' work.

Removing and applying headlight, lamp and flagstaff brackets and supports, eave guards and hand rails.

Side rods, main rod, knuckle and driving pin work. Driving brake and spring rigging work. Fitting up and repairs to driving and truck boxes, including replacing of brasses.

Examination, repairing and aligning jack shafts. Refitting jack shaft collars and jack shaft casings. Repairing and maintaining air brake equipment and air compressors.

Drilling driving and truck wheels by use of ratchets or portable motors for hub liners. Applying driving and truck wheel hub liners. Driving and truck wheel tire work. Drilling, reaming and tapping holes in cabs and frames for bolts and parts.

Turning and dressing journals, and all frame and truck work, including stripping and rebuilding.

Removing and replacing main motors, including gears and bearings, and shifting gears.

Machinists' work in connection with raising cab, running out and replacing trucks and lowering cab.

Mallet coupler device between units.

Removing and replacing circulating pump and motor, except pipefitters and electrical work.

Removing, repairing and replacing work in connection with water rheostats, hand pumps and lubricators.

Examining, removing, repairing and replacing bearings.

Installing and relocating braces, stay rods, oil guards, hand brakes, air ducts, sand boxes and bellows under cab.

Whistle and bell work.

Installing and maintaining machinists' work in connection with turbine engines, motors, pumps and auxiliaries in powerhouse.

Repairs to air hammers, air motors, vise, floor and drop pit work, as well as the handling of work generally recognized as machinists' work.

Removing and replacing phase converters.

Machinists' work in connection with dismantling of phase converters, such as removal of bolts, parts, bearing caps, bearings and clamps.

Machinists' work in connection with assembling phase converters, including detail parts.

Lathe and other machinists' work in connection with construction of pantographs.

And all other work on these engines, cars and machines now covered in the general classification in our Constitution.

All of the foregoing, and in addition thereto any other work which does now, or in the future may, as industries develop, fall naturally within the scope of the jurisdiction of The International Association of Machinists, shall constitute work coming under its jurisdiction, and shall be performed by members of the aforesaid organization.

264 CONSTITUTION OF THE GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS

ARTICLE I

Name and Location

SECTION 1. This organization shall be known by the title and name of "The Grand Lodge of the International Association of Machinists," and its principal office and headquarters shall be permanently located in the city of Washington, D. C.

Membership and Jurisdiction

SEC. 2. The Grand Lodge of The International Association of Machinists shall consist of an Executive Council (including the International President and General Secretary-Treasurer) and the representatives of local lodges who are duly elected, qualified, and seated as delegates in the quadrennial and special conventions provided for in Article X of this Constitution. It shall have power to grant charters for the purpose of organizing, supervising, controlling, and generally directing district and local lodges in any State, territory, or dependency of the United States of America, Newfoundland and the Dominion of Canada.

Government

SEC. 3. The government and superintendence of all district and local lodges shall be vested in this Grand Lodge as the supreme head of all such lodges under its jurisdiction. To it shall belong the authority to determine the customs and usages in regard to all matters relating to the craft.

Government Between Conventions

SEC. 4. Between conventions all Executive and Judicial Powers of the Grand Lodge shall be vested in the Executive
265 Council, which shall be composed of the International President, the General Secretary-Treasurer, and 7 General Vice-Presidents.

ARTICLE II

Grand Lodge Officers and How Chosen

Officers

SECTION 1. The officers of the Grand Lodge of the International Association of Machinists shall be an International President, a General Secretary-Treasurer, seven (7) General Vice-Presidents, one of whom shall be from Canada, and an Editor of the Machinists' Monthly Journal.

Three (3) delegates to the American Federation of Labor; delegates to the Trades and Labor Congress of Canada and five (5) members of the Committee on Law shall be elected concurrently with the Officers of the Grand Lodge, and in addition thereto two (2) delegates to the American Federation of Labor shall be appointed by the International President. These delegates and committeemen shall not be considered as Grand Lodge Officers.

Qualifications

SEC. 2. Candidates for office in the Grand Lodge, delegates to the American Federation of Labor, delegates to the Trades and Labor Congress of Canada, and the Committee on Law must be members who have been in continuous good standing for at least five years immediately prior to their nomination and free from delinquencies of any nature to the Grand Lodge or any district or local lodge of The International Association of Machinists. Such candidates must be working at the trade at the time and for one year next preceding their nomination. Salaried officers or employees of the Grand Lodge, district lodges, local lodges, and The American Federation of Labor are excepted from this provision, provided such employment and other employment at the trade, separately or jointly, has been continuous during the twelve months next preceding their nomination. The qualification "working at
266 the trade at the time and for one year next preceding their nomination," shall not be required of or apply to members of this Association who have been unable to obtain employment as a result of a strike, lockout, discrimination, or temporary physical disability.

Endorsement for Nomination

SEC. 3. On the 1st day of January, 1929, and on the 1st day of January of every fourth year thereafter, the General Secretary-Treasurer shall issue a circular to all local lodges calling for endorsements of nominees for all Grand Lodge officers, three delegates to the American Federation of Labor, delegates to the Trades and Labor Congress of Canada and members of the Committee on Law, which circular shall be accompanied by proper blanks or forms for the return of endorsements for nomination by local lodges.

After the receipt of said circular, and at the last regular meeting in the month of January—of which meeting notice shall be served upon members by shop bulletin, mail or otherwise—local lodges may, by a majority vote of those voting, endorse one candidate for each elective office, delegation and committee, and on or before 12 o'clock midnight January 31st the recording secretary of each local lodge shall forward to the General Secretary-Treasurer by registered mail a correct list of all endorsements for nominations and the office for which the individual is endorsed, together with his lodge and card number, upon the blanks or forms provided therefor by the General Secretary-Treasurer.

Filing and Publication of Endorsement

SEC. 4. All such endorsements for nominations for Grand Lodge officers, delegates and committees must be on file in the office of the General Secretary-Treasurer by 12 o'clock noon on February 8th; and the General Secretary-Treasurer shall thereafter tabulate the same and cause the full and complete tabulation to be published in the next issue of the Journal showing the local lodges making the endorsements, the individuals endorsed, the office for which the individual is endorsed, and designating the individuals who are thereby chosen as nominees under the provisions of Section 5 of this Article.

267

Number of Nominees

SEC. 5. From the endorsements received from local lodges, there shall be selected for each elective position the two candidates receiving the highest number of endorsements, and the two so selected shall constitute the candidates on the final ballot.

Pledge to Accept Nomination

SEC. 6. On or before February 12th, the General Secretary-Treasurer shall, by registered letter, notify all candidates who have received the endorsement of ten (10) different local lodges, of that fact; and each candidate so notified shall, within ten days after receipt of notification, inform the General Secretary-Treas-

urer by registered mail of his acceptance or declination of the endorsements for nomination, together with a statement that he is duly qualified under the provisions of this Constituion, which statement shall be certified by the financial secretary of the local lodge of which the candidate is a member. On failure of any candidate to comply with this provision, it shall be the duty of the General Secretary-Treasurer to strike his name from the list, and to at once notify the candidate or candidates receiving the next greatest number of endorsements of any declination that has been received or of the failure of any candidate to accept.

Preparation and Description of Ballots

SEC. 7. After the foregoing provisions have been complied with, the General Secretary-Treasurer shall, not later than 12 o'clock noon, March 15, prepare the ballot and have printed thereon the names of all eligible candidates, together with the number of lodges of which they are, respectively, members, said names to be arranged in order according to the number of endorsements received by each candidate for the office stated. All ballots shall bear the seal of the Grand Lodge, and be so arranged that a voter may with ease designate his choice by marking a cross (X) opposite the names of those for whom he wishes to record his vote. Whenever two or more are to be elected to the same office, committee or
268 delegation, a failure to vote for the required number of candidates therefor shall invalidate the vote as to such office, committee or delegation. Ballots shall be perforated so that the name, address, lodge and card number of member voting may be detached.

Both the ballot and the perforated detachable stub, shall contain a corresponding serial number.

The General Secretary-Treasurer shall supply all lodges, free of cost, with a sufficient number of such ballots on or before the first day of April, and no other ballots shall be used. He shall furnish tally sheets in duplicate, upon which shall be tabulated the votes of the members of the lodge. One tally sheet shall be retained by the Recording Secretary of the local lodge and one shall be returned to the General Secretary-Treasurer.

Place of Voting

SEC. 8. The election of officers of the Grand Lodge, Committee on Law, delegates to the American Federation of Labor, delegates to the Trades and Labor Congress of Canada, or other bodies with which this Association is, or may be affiliated, shall be held on the first regular meeting of each local lodge, in the month of April, in the lodge room where the regular lodge meetings are held, and upon no other day or in any other place. Members temporarily

absent from the city may vote as provided by Section 10 of this Article.

Qualification to Vote

SEC. 9. Only members of local lodges and individuals affiliated with the Grand Lodge as provided for under Article XX of this Constitution, who are in good standing and free from delinquency of any nature to the Grand Lodge, district or local lodges shall be allowed to vote at any election.

Notification—Absent Members

SEC. 10. All members shall be notified by mail or shop bulletin of such election, and ballots shall be mailed to members who reside in outlying districts more than fifteen (15) miles from the 269 city limits of the city in which the lodge is located, and to members temporarily absent from the city. Such ballots must be returned to the Local Lodge within the time specified for receiving votes under Section 12 of this Article.

Inspectors of Election

SEC. 11. At the last regular meeting in the month of March, of each four-year period following March, 1929, each local lodge shall elect three members as inspectors of election who shall receive, record and count the vote of the members of their local lodge. In case one or more of said inspectors are unable to act, then the president of said local lodge shall fill the vacancy by appointment.

Time and Method of Voting

SEC. 12. Votes shall be received by the inspectors of election from the opening to the closing of the local lodge at the first regular meeting, which meeting must be held not later than the fourteenth of the month, and at no other meeting, in the month of April. Provision must be made to accommodate members who are working nights, and in order that all may have an opportunity to record their vote, the regular lodge meeting during which the vote is to be taken, may be convened as early as 8 A. M. All ballots must be marked in ink or pencil. All votes shall be deposited in the presence of at least two of the inspectors. Each voter shall write his name, lodge and card number in the space provided upon the perforated register slip attached to the ballot provided for that purpose. The inspectors shall require each voter to present his due book for inspection and shall mark the same in order to show that the member has voted. No member shall be allowed to fill out the ballot for any other member. Any member who, after due trial, is found guilty of illegal voting or in any other way preventing an honest election shall be liable to a fine or expulsion.

The General Secretary-Treasurer shall forward a ballot by mail to the last known address of each individual who hold a membership in direct affiliation with the Grand Lodge under the provisions of Sec. 1 of Article XX of this Constitution. Such affiliated
270 members may vote by marking their respective ballots as though voting in a local lodge and shall return their marked ballots to the General Secretary-Treasurer within the time limits prescribed for local lodges. The General Secretary-Treasurer shall count the votes of all such affiliated members and report the same in the detailed statement required under Section 14 of this Article.

Tabulation of Returns and Care of Ballots

SEC. 13. The inspectors of election of each local lodge, with such assistance as the lodge may deem necessary, shall upon the close of the polls, proceed to count the vote cast, tabulate the results in duplicate on the tally sheets furnished by the Grand Lodge, and, within seventy-two (72) hours from the close of the polls, forward one copy thereof, together with all ballots cast, to the Grand Lodge Election Tellers, in care of the General Secretary-Treasurer, by registered mail. The ballots and tally sheets shall be mailed in special containers or envelopes, to be furnished by the General Secretary-Treasurer, and plainly marked to designate their contents. These packages and envelopes shall only be opened in the presence of the three Grand Lodge Election Tellers. Ballots and tally sheets not mailed within seventy-two (72) hours after the close of the polls shall not be counted. The duplicate copy of the tally sheets shall be placed in the hands of the Recording Secretary of the Local to be spread upon the records of the lodge. The perforated register slips containing the name, address, lodge and card number of each member voting, shall be retained by the local lodge for a period of ninety days and shall be surrendered to the Grand Lodge Election Tellers if required and ordered by them.

Representation at Count

SEC. 14. Each nominee for President shall on or before the first day of May select a member of the Association, residing within 250 miles of the Grand Lodge Headquarters, to act as his teller. In the event that there is only one nominee for President, then the two candidates for General Secretary-Treasurer shall select the tellers. In the event that there is only one nominee each
271 for the offices of President and General Secretary-Treasurer, then the two candidates for Editor of the Journal shall select the tellers. The spirit of this section is to be construed that the opposing candidates shall have the right to select the tellers in rotation and where a candidate is unopposed he shall not have the right to select a teller.

The two tellers thus selected shall employ as a third teller a certified public accountant from the District of Columbia, who shall act as chairman of the Grand Lodge Election Tellers. The two Grand Lodge Election Tellers chosen by candidates shall, while engaged in counting and supervising the Grand Lodge election returns, receive as compensation $10 per day, with railroad fare, and actual hotel expenses, if residing outside the city of Washington.

Counting the Votes

SEC. 15. The General Secretary-Treasurer shall be custodian of all ballots and tally sheets and he shall, after the Grand Lodge Election Tellers are duly organized and on their demand, surrender unopened and in their original containers all ballots and tally sheets.

The Grand Lodge Election Tellers shall meet at the Grand Lodge offices on the first day of May and proceed with the count. The Grand Lodge Election Tellers shall have full charge of the counting of the ballots, assisted by such help as they may require, to be furnished by the General Secretary-Treasurer. They shall have power to adopt rules to govern their work, and to hear complaints, and make adjustments, and render decisions strictly in accordance with the law. After they have counted and tabulated the vote they shall render a report containing a detailed statement of the vote cast in each lodge together with a report on all irregular or contested ballots, for the respective candidates. Their report shall be published in the June issue of the Journal.

Declaration of Election

SEC. 16. The nominees receiving the highest number of votes for the respective offices shall be declared duly elected by the Grand Lodge Election Tellers.

272

Second Ballot

SEC. 17. In case that candidates for any office receive an equal number of votes, or a tie vote, their names shall be resubmitted in accordance with Section 7, Article II of this Constitution, and such procedure shall be continued until some one candidate shall receive a greater number of votes than the other candidate contesting for the same office. If the second or other succeeding ballots do not result in an election prior to the expiration of the term of office of the then incumbent, said incumbent shall be retained in office until his successor is duly elected.

Filling Vacancies

SEC. 18. Should a vacancy occur in any Grand Lodge office between elections, through any cause (other than a Recall), the

vacancy shall be filled in accordance with the provisions of Article III, Section 4, and Article IV, Section 2, except that when such vacancy occurs within one year prior to the call for nominations in Grand Lodge elections, the member appointed to the vacancy shall complete the unexpired term.

Installation

SEC. 19. Grand Lodge officers shall be installed by the International President, or his deputy, and they shall assume the duties of their respective offices the first day of July following their election, or as soon thereafter as the result is made known: Provided, that each officer shall qualify within ten (10) days after being notified to appear for installation.

Recall Provisions

SEC. 20. (a) Any local lodge in good standing with the Grand Lodge of the International Association of Machinists may propose the recall of any one or more of the Grand Lodge officers the Committee on Law and delegates to the A. F. of L. and the Trades and Labor Congress of Canada by filing with the General Secretary-Treasurer a petition for the recall of such officer or officers, 273 together with the endorsements thereof under the seal of at least fifteen (15) per cent of all the local lodges in good standing with the Grand Lodge of the International Association of Machinists, not more than fifteen (15) of which endorsing local lodges shall be located in any one state, province, or territory. Every petition for a recall must contain a clear, concise statement of the specific charges against such officer or officers upon which the proceedings are based. All circulars issued by a local lodge for the purpose of securing the endorsements of other local lodges must be identical as to content and form including the endorsement form attached thereto. All such circulars shall bear the date of issuance, be made returnable to the local lodge issuing the same and deposited by such local lodge with the General Secretary-Treasurer within forty-five (45) days after the date thereof.

(b) Upon receipt of the petition and endorsements for recall, the General Secretary-Treasurer shall forthwith notify the officer or officers whose recall is sought and furnish him or them with a correct copy of the petition and the numbers of the local lodges appearing as endorsers thereof, and such officer or officers may within ten (10) days thereafter file a written statement of defense, containing not more than 500 words, with the General Secretary-Treasurer, who shall cause the same to be printed and mailed to all local lodges concurrently with the call for the endorsements for nominees next hereinafter provided for.

(c) On the first day of the month next following, the General Secretary-Treasurer shall issue a circular to all local lodges call-

ing for endorsements of nominees for the office or offices held by the officer or officers whose recall is sought. The selection of candidates and the election, and the tabulating and counting of the votes, except as hereinafter modified, shall proceed in accordance with the election laws hereinabove set forth, substituting the name of such months as may be necessary to hold an interim election in place of those months specified in Section 3 and 4 of this Article.

(d) Unless the officer whose recall is sought lacks the necessary qualifications or files a written declination with the General Secretary-Treasurer, his name shall be printed upon the official ballot together with the name of the one other candidate
274 who has received at least twenty-five (25) endorsements and the greatest number of endorsements as candidate for nominee for that office. Should the officer whose recall is sought decline to be a candidate or lack the necessary qualifications, then the names of two persons who have each received at least twenty-five (25) endorsements and greatest and next greatest number of endorsements, respectively, as candidates for nominee for such office shall be printed upon the official ballot as candidates for such office.

(e) The candidate for any office who receives the greatest number of votes in any recall election shall be promptly notified of his election by the General Secretary-Treasurer. If the officer whose recall is sought, be not elected, his tenure of office shall terminate fifteen (15) days after the result of the election is announced and the newly elected officer shall thereupon assume the duties of the office.

ARTICLE III

International President

SECTION 1. The International President shall preside at all meetings of the Grand Lodge. He shall serve as chairman and as a member of the Executive Council. He shall preserve order, and in all cases where the vote is equally divided in a convention or a meeting of the Executive Council he shall cast the deciding vote. He shall enforce the laws of The International Association of Machinists; decide all questions of order and usage and all constitutional questions, subject, however, to an appeal as provided in Section 6, Article XXI of this Constitution.

Chief Organizer

SEC. 2. The International President shall be the chief organizer of the Grand Lodge and shall have full control of all Grand Lodge representatives and of all organizing. He shall provide suitable literature for organizing purposes and have the authority when conditions warrant to appoint Grand Lodge representatives and

assign them to such localities and for such particular terms and duties as shall be for the best interests of the organization. All of which shall be subject to the approval of the Executive Council.

Signing Orders

SEC. 3. The International President shall countersign all orders for the payment of money by the Grand Lodge and for the withdrawing of money on deposit to its account.

Officers Permanent and Temporary and the Committees

SEC. 4. The International President shall assign the elected Vice Presidents to such territories or industries as are necessary to promote the best interests of our Organization as provided in Section 4 of Article IV.

He shall also appoint all officers pro tem or Committees not otherwise provided for, and may deputize other members of the Organization in good standing to perform any of the duties of his office, except that during his absence from the Grand Lodge Headquarters he shall, if he deems it necessary, designate one of the elective Grand Lodge Officers to exercise the authority of his office.

In cases of vacancies occurring in any Grand Lodge office, the President shall temporarily appoint a qualified member to fill such office, but such appointment shall not be made for a longer period than is necessary to hold a special election under the provisions governing our general elections, except that when such vacancy occurs within one year prior to the call for nominations in Grand Lodge elections, the members appointed to the vacancy shall complete the unexpired term.

Supervision of District and Local Lodges

SEC. 5. The International President shall have the direction and supervision of all districts and local lodges, with full authority to suspend individual members, or district or local lodges, for incompetency, negligence, insubordination, or other failure to properly perform their duties as members of this organization and for violation of the provisions of the Constitution of the Grand Lodge or the constitution of local lodges. With the approval of the Executive Council he may revoke the charter of any district or local lodge found guilty after trial by the Executive Council of a violation of the Constitution of the Grand Lodge, or the constitution for local lodges of the International Association of Machinists.

Any District or Local Lodge, or any individual, subject to trial by the Executive Council, shall have the right to demand that the trial be conducted in the locality where the offence is alleged to

have been committed. Either the Executive Council or its authorized representatives shall conduct the trial, of which a full transcript shall be made, upon which transcript the findings shall be based.

Visiting Lodges

Sec. 6. Should any district or local lodge be involved in trouble, and in all cases when a grievance is submitted to the Executive Council, the International President shall visit said district or local lodge in person or by deputy.

Report to Executive Council

Sec. 7. Whenever the International President submits, through correspondence, any question to the members of the Executive Council for their decision, he shall notify the members of such Council, and all other parties in interest, of the decision of the Executive Council immediately upon receipt thereof.

Salary of International President

Sec. 8. For the faithful performance of his duties, the International President shall receive an annual salary of $7,500 payable in 52 equal weekly installments.

277

ARTICLE IV

Executive Council

Membership and Meetings

Section 1. The Executive Council shall consist of the International President, the General Secretary-Treasurer and the General Vice-Presidents. The International President shall be the Chairman and the General Secretary-Treasurer shall be the Secretary of the Executive Council. Meetings shall be called by the Chairman from time to time as the affairs of the Association require consideration by the Council, and meetings must be called by him upon request from a majority of the officers composing the Council.

Powers

Sec. 2. Between conventions all Executive and Judicial powers of the Grand Lodge shall be exercised by the Executive Council, sessions of which shall have the same authority to initiate legislation as has a delegate convention of the Association, and which shall have the power to require reports from any officer or officers of the Grand Lodge or any district or local lodge, or to remove any such officer or officers for justifiable cause. In the event of a vacancy occurring in the office of the International President, the Executive Council shall appoint a member of this Association

who has the qualifications as set forth in Section 2 of Article 2 to act as temporary International President, but no such appointment shall be made for a longer period than is necessary to hold a special election under the provisions of the law governing our general elections except that when such vacancy occurs within one year prior to the call for nominations in Grand Lodge elections, the member appointed to the vacancy shall complete the unexpired term.

Investment of Funds

SEC. 3. The Executive Council shall have full control
278 over all of the funds, deposits, investments and property of every kind, nature and description belonging to the Grand Lodge of The International Association of Machinists. All investments of the funds of the Grand Lodge made upon the order of the Executive Council shall be in the name of the Grand Lodge of the International Association of Machinists, so that no amounts can be withdrawn therefrom without the signatures of tse International President, the General Secretary-Treasurer and one member of the Executive Council, upon an order to which the seal of the Grand Lodge is attached. The Executive Council may withdraw investments, negotiate loans upon securities belonging to the Grand Lodge of The International Association of Machinists, and sell such securities as the needs of the Grand Lodge may require; but no such withdrawals, sales, or transfers shall be negotiated without the authority of the Executive Council evidenced by the signatures of the International President, the General Secretary-Treasurer and one member of the Executive Council, upon which the seal of the Grand Lodge is attached. The Executive Council shall have power to borrow from one fund to another in cases of great emergency, provided that provision is made in the resolution sanctioning the loan for its repayment.

The funds of the Grand Lodge of The International Association of Machinists shall be invested only in United States Government Bonds, United States Government Notes, State and Municipal Bonds, supported by the general income of the State or Municipalities, Bonds of the Government of the Dominion of Canada and other investments that would be approved by the Probate Court of the District of Columbia as suitable investment for guardian or trustee funds.

Duties of Vice Presidents

SEC. 4. When not in attendance at meetings of the Executive Council, the General Vice Presidents shall act as General Organizers, or shall perform such duties in such territories or industries as may be decided by the International President to be for the best interests of the Association and shall report their activities through the Journal every three months.

279 Expenses and Recommendations

SEC. 5. During each and every week the General Vice-Presidents shall file with the International President an itemized account and full report of their expenses, and activities as officers of the Grand Lodge.

Salary

SEC. 6. For the faithful performance of their duties the General Vice-Presidents shall each receive an annual salary of $4,500, payable in 52 equal weekly installments.

ARTICLE V

Duties of the General Secretary-Treasurer

SECTION 1. The General Secretary-Treasurer shall be the secretary and keep correct records of all meetings of the Executive Council and of all conventions of the Grand Lodge of The International Association of Machinists. He shall cause the proceedings of all meetings of the Executive Council to be printed in pamphlet form and mail a copy thereof to each local lodge within fifteen days after the adjournment of such meetings. He shall conduct all correspondence in the name of the Grand Lodge, excepting correspondence dealing with the duties and responsibilities of the offices of the International President and the Editor, and be subject to the directions of the Executive Council. Whenever necessary he may visit any local or district lodge for the purpose of instructing the officers in the performance of their duties. He shall have the general supervision of the business of his office and, upon request, shall submit his books of account together with all papers, files, documents, etc., in his possession for the inspection of the Executive Council and the duly appointed Auditing Committee. He shall also codify and index the various articles and sections of the Constitution.

Receipt of Funds

SEC. 2. The General Secretary-Treasurer shall receive all
280 funds paid to the Grand Lodge from all sources and distribute same to the credit of the accounts for which they are intended. He shall keep a systematically arranged book account between the Grand Lodge and each local lodge, and a journal subscription list; he shall issue monthly, in pamphlet form, an itemized account of all receipts and expenditures, and a monthly review statement showing in detail all financial transactions between the Grand Lodge and local lodges; he shall upon request of any local lodge furnish a copy of the expense account of any paid representative of the Grand Lodge for the period specified by such local

lodges, provided such request does not include a period prior to the next preceding Grand Lodge audit.

All receipts from investments made by the Grand Lodge shall be placed in an emergency fund and used for reinvestment under authority of the Executive Council.

Audit of Local and District Lodges

SEC. 3. The General Secretary-Treasurer shall audit the books of any local or district lodge whenever in his opinion such an audit is advisable, and he shall from time to time appoint with the approval of the Executive Council such auditors as may be necessary to carry on this work.

Upon demand therefor by the General Secretary-Treasurer, the officers of any local or district lodge shall forthwith surrender and turn over to the General Secretary-Treasurer or to an auditor whom he may designate, all books, vouchers, bills, receipts and records of such local or district lodge. Any local or district lodge, or officer thereof, who refuses to comply with the provisions of this section shall be liable to suspension or expulsion by the Executive Council.

Deposit of Funds

SEC. 4. All moneys received by the General Secretary-Treasurer shall be deposited daily by him in a bank of sound financial standing in the name of the Grand Lodge of The International Association of Machinists, which deposit shall be subject to withdrawal check signed by the General Secretary-Treasurer and countersigned by the International President. He shall invest, in
281 conformity to the provision as contained in Article IV, Section 3, the accumulated funds of the Grand Lodge of The International Association of Machinists in excess of $[illegible],000 as directed by the Executive Council.

Per Capita Tax For All Workers Whether Male or Female

SEC. 5. The General Secretary-Treasurer shall collect per capita tax in proportion to the business transacted as shown by the regular monthly report of each local lodge, in accordance with the following rates which include subscription to the Machinists' Monthly Journal:

Monthly per capita tax for Journeymen and Specialists	$1.00
Monthly per capita tax for Apprentices	.50
Monthly per capita tax for Machinists Helpers and Production Workers	.65
Initiation and Reinstatement Fees for Journeymen, Specialists, Machinists Helpers, Apprentices and Production Workers	1.50
Initiation and Reinstatement Fees on Grand Lodge Initiations and Reinstatements	7.50
Monthly dues for tic and Lodge Affiliation	2.00
Unemployment Stamps	.10

The General Secretary-Treasurer shall furnish a suitable due book at a cost to lodges of not more than ten (10) cents each, in which stamps may be affixed and cancelled. Such due books shall provide spaces for the entering therein of transfers, assessments and the designation of the amount of dues charged by each lodge and for the registering of votes in Grand Lodge elections.

Upon receipt of per capita tax, accompanied by the report of any local lodge, the General Secretary-Treasurer shall furnish stamps as receipts, in proportion to the number of initiations, reinstatements and number of months' dues paid. He shall also keep a record of all individuals affiliated with the Grand Lodge because they are working in localities where there is no local lodge.

Reports

SEC. 6. All decisions rendered by the International Presi-
282 dent or by the Executive Council, whether through correspondence or in regular session, shall be published in full by the General Secretary-Treasurer in the next monthly pamphlet containing itemized statement of receipts and expenditures provided for in Section 2 of this Article; and he shall perform such other duties as may be required of him by the laws, customs and usages and the Constitution of the Grand Lodge of The International Association of Machinists.

Assistant

SEC. 7. The General Secretary-Treasurer shall appoint an assistant secretary, who must be a member in good standing of a local lodge of The International Association of Machinists, and employ such other help as may be necessary to perform the work of his office, subject to the approval of the International President and the Executive Council.

Salary

SEC. 8. For the faithful performance of his duties the General Secretary-Treasurer shall receive an annual salary of $6,500, payable in 52 equal weekly installments. He shall give a bond for the faithful performance of his duties in the sum of $100,000, to be approved by the Executive Council.

Duties of Assistant Secretary

SEC. 9. The Assistant Secretary shall perform all duties assigned to him by the General Secretary-Treasurer, and in the absence of that official, shall have supervision of the office. For the faithful performance of his duties he shall receive a salary of $3,600 per year, payable in 52 equal weekly installments.

Bond of Assistant Secretary

SEC. 10. The Assistant Secretary shall give bond for the faithful performance of his duties in such amount and with such surety as may be approved by the Executive Council.

283

Grand Lodge Auditors

SEC. 11. Grand Lodge Auditors shall perform such services as may be required of them by the General Secretary-Treasurer, and shall receive a salary of $3,600 per year, payable in 52 weekly installments.

ARTICLE VI

The Journal and Duties of the Editor

Journal and Editor

SECTION 1. The Grand Lodge of The International Association of Machinists shall publish a monthly magazine to be known as the "Machinists' Monthly Journal," which shall be edited and published under the management and supervision of the Editor, with and under the advice of the Executive Council.

Subscriptions

SEC. 2. Subscriptions to the Journal shall be at the rate of $1.00 per annum and shall be included and collected in the regular per capita tax. The Journal shall be mailed to the home address of each subscriber.

Journal Finance

SEC. 3. All moneys received from subscriptions, advertising, or other source in connection with the publication of the Journal shall be paid to the General Secretary-Treasurer, who shall hold the same as a separate fund of the Grand Lodge of The International Association of Machinists, and all bills chargeable against the Grand Lodge in connection with the publication of the Journal shall be paid from said special fund by warrant duly signed by the International President. All contracts for advertising in the Journal shall be made subject to the right of the Grand Lodge to cancel the same should the advertiser become involved in any dispute with organized labor.

284

Journal Contents

SEC. 4. The Machinists' Monthly Journal shall contain the roster of the Grand Lodge of The International Association of Machinists, and shall be devoted to the interests of the members

of the machinist craft and the advancement of the principles of organized labor. To this end the Editor shall become informed upon current legislative enactments, judicial decisions, labor statistics, etc., of interest to and affecting the labor movement, and from time to time shall publish the same in the Journal for the information of the members of local lodges. The Editor, subject to the supervision of the Executive Council, shall decide upon all matters for publication in the Journal except that no matters that are sectarian in religion or partisan in politics shall be published therein. The rejection of any matter submitted by a local lodge under seal for publication in the Journal shall be accompanied by a letter from the Editor giving such local lodge a full statement of the reasons therefor.

Neither the editorial or other columns of the Machinists Monthly Journal shall be used to support or oppose the candidacy of any member running for office in the Grand Lodge.

Salary

SEC. 5. For the faithful performance of his duties, the Editor shall receive an annual salary of $4,500, to be paid in 52 equal weekly installments.

ARTICLE VII

Auditing Committee

SECTION 1. Semi-annually the local lodges within a radius of 40 miles of Grand Lodge headquarters shall elect an Auditing Committee of three members. The International President shall select, in regular rotation each six months, three of the 285 above lodges, who shall each elect one member of the Auditing Committee. No individual member shall serve on the Grand Lodge Auditing Committee more than once in three years.

This auditing committee shall employ an expert accountant and proceed in the third week in January and July of each year to examine and make a complete audit of the books and accounts of the Grand Lodge of The International Association of Machinists, covering the six months period ending June 30th and December 31st. A full report, including a statement of all assets and liabilities of the Grand Lodge, shall be published over the signatures of and verified under oath by the individual members of said auditing committee and the expert accountant who assisted them. Each member of the auditing committee shall receive the maximum rate of pay for Journeymen Machinists in the District of Columbia for the time actually engaged in the performance of his duties, and the expert accountant shall have such compensation as is agreed upon by a majority of the members of the auditing committee and said accountant, all of which expenses shall be paid by the Grand Lodge.

ARTICLE VIII

Grand Lodge Representatives

SECTION 1. All Grand Lodge Representatives appointed by the International President under authority of Section 2 of Article III of this Constitution shall be members of a local lodge and in continuous good standing for at least five years immediately prior to their appointment, free from delinquencies of any nature to the Grand Lodge or to any district or local lodge of The International Association of Machinists. For the faithful performance of their duties, Grand Lodge Representatives shall receive an annual salary of $3,600, payable in 52 equal weekly installments.

286

ARTICLE IX

Conventions

Method of Calling Conventions

SECTION 1. During the month of September in the year 1932, and every four years thereafter, a Grand Lodge Convention of the Association shall be held in a city to be selected by the General Executive Council. Notice of such conventions shall be issued to all local lodges by the General Secretary-Treasurer not later than the 1st of May in each convention year. In case of an emergency the Executive Council may, upon its own initiative, or after having received the endorsement under seal of at least twenty (20) per cent of all local lodges, not more than fifteen (15) of which are located in any one state, province or territory, submit a call for a special convention, and thereupon the General Secretary-Treasurer shall prepare a ballot and submit the same through the referendum calling for a special convention of the Grand Lodge to convene at such date as seems best to meet the emergency. In the event that a majority of those voting, vote in favor of holding a special convention, the Executive Council shall, as soon as practicable thereafter, select the city in which said special convention shall be held.

Representation and Vote

SEC. 2. Each local lodge is entitled to be represented in all conventions of the Grand Lodge by one delegate, and in addition thereto each local lodge having a membership of more than 200 is entitled to an additional delegate for each additional 200 members or major fraction thereof. Each local lodge represented in convention by a delegate is entitled to one vote, and all local lodges having a membership of more than 100 are entitled to one additional vote for each additional 100 members or majority fraction thereof.

287 The number of votes each local lodge is entitled to shall be computed upon the number of members of such local lodge in good standing at the close of the month of July of the convention year. The delegation of any local lodge may by unanimous consent cast the vote to which said lodge is entitled as a unit, or the vote to which said lodge is entitled may be divided equally among its delegates, and in case an equal division is impossible the fractional number of votes left after the division shall be cast by the first delegate elected by said lodge. If, however, not more than three local lodges, within a radius of 150 miles of each other, and each having less than one hundred members, so desire, they may combine to send one delegate to represent them at Grand Lodge Convention. Such delegate must be elected by a majority vote in each of the lodges so combining and the voting power of such combined lodges shall be based upon their combined membership exactly as if it were one lodge.

Election of Delegates

SEC. 3. At a summoned meeting of each local lodge, in the month of June of convention years, an election of delegates and alternate delegates shall be held by all local lodges, and the secretary of each local lodge shall immediately thereafter forward to the General Secretary-Treasurer a report of the election, giving the names, card numbers and residence address of all delegates and alternate delegates, which report shall be made upon blank forms furnished therefor by the General Secretary-Treasurer.

Local lodges organized and affiliated with the Grand Lodge in the month of June of a convention year may elect delegates and alternate delegates during the month of July. Local lodges organized and affiliated after July 1st of any convention year are not entitled to representation in the convention.

The General Secretary-Treasurer shall prepare and forward a complete list of all duly elected delegates and alternate dele-
288 gates with their respective addresses to all local lodges not less than 30 days prior to the opening of the convention.

He shall also mail to each delegate a copy of the "Report of Grand Lodge Officers" so that it will be in the hands of the delegates thirty days before the convention opens.

Should any delegate or alternate delegate be unable to serve as such, the local lodge may elect his successor at any meeting prior to the convening of the convention, and the secretary of such local lodge shall forthwith notify the General Secretary-Treasurer of the change.

Whenever a special convention of the Grand Lodge has been called by a vote submitted through the referendum, the General Secretary-Treasurer shall rearrange the dates for the election of delegates, etc., in strict accordance with the provisions of this

Article, to meet the emergency necessitating the holding of the convention.

Qualifications of Delegates

SEC. 4. Every delegate to conventions of the Grand Lodge must be a member in good standing of the local lodge from which he holds credentials for at least six months prior to his election, free from delinquencies of any nature to the Grand Lodge or to any district or local lodge, and at the time of his election and for six months prior thereto working at the trade. This qualification shall not be required of or apply to any salaried employee whose time is fully occupied by the Grand Lodge or any district or local lodge of The International Association of Machinists, or by the American Federation of Labor, nor to individuals who have been unable to obtain employment at the machinist trade because of a strike, lockout, discrimination or temporary physical disability, or to members who are retired on pension and are paying full membership dues.

No local lodge shall be entitled to representation in any convention of the Grand Lodge unless such local lodge was in good standing, free of delinquency of any nature to the Grand Lodge at the close of the month of June of the convention year.

289

Grand Lodge Officers Not Eligible

SEC. 5. No member shall serve as a delegate to a Grand Lodge Convention who is, during the time of the convention, on the pay roll of the Grand Lodge.

Delegates' Expenses

SEC. 6. The transportation of one delegate from each local lodge in continuous good standing with the Grand Lodge for six months prior to the convening of the convention and who is accepted and seated in the convention as a delegate, shall be paid by the Grand Lodge upon presentation of the bill of the local lodge, an amount equal to the current round trip railroad fare between the place in which the local lodge is located and the place where the convention is held. Lodges whose delegates travel on passes, shall be entitled to round trip transportation for one delegate, from the place where the lodge is located, to the place where the convention is held, upon presentation of the bill of the local lodge therefor.

Credentials Committee

SEC. 7. The Executive Council shall act as the committee on credentials at all conventions of the Grand Lodge and shall meet within four days next preceding the convening of the convention

to consider all matters affecting the qualifications of delegates, including the financial standing of local lodges with the Grand Lodge, and shall thereafter report its finding and recommendations to the convention.

Resolutions Committee

SEC. 8. At least fifteen (15) days before the convening of any convention of the Grand Lodge, the International President shall appoint five (5) duly elected and qualified delegates to such convention as a resolutions committee. The five delegates so appointed may, on the authority of the International President, be called in not more than seven days before the convention convenes for the purpose of considering such resolutions as may properly come before the convention, and shall report their findings and recommendations to the convention as early as the business of the convention will permit.

For the faithful performance of their duties each member of the resolutions committee shall receive twelve dollars ($12) per day together with actual and necessary hotel expenses, for the time engaged prior to the convening of the convention and after arrival at the convention city.

Committees

SEC. 9. The International President shall appoint a committee on rules for each convention of the Grand Lodge. All committees necessary for conducting the business of the convention, not otherwise provided for, may be appointed by the International President and Executive Council, subject to the approval of the convention.

Parliamentary Laws

SEC. 10. Roberts' Rules of Order shall be the parliamentary law of this Grand Lodge and shall apply to all parliamentary procedure of the Grand Lodge, except in cases otherwise provided for by this Constitution.

ARTICLE X

Revenues of the Grand Lodge

SECTION 1. The Revenue of the Grand Lodge of The International Association of Machinists shall be derived from the sale of supplies, collection of per capita tax, initiation fees, reinstatement fees, the income from the publication of the Machinists' Journal, interest on investments and such special assessments as may be levied from time to time.

291

Assessments

SEC. 2. Whenever in the opinion of the Executive Council additional funds over and above the regular income are necessary to carry on the work of the Grand Lodge, the General Secretary-Treasurer shall prepare a ballot and submit the same through the referendum calling for the assessment recommended by the Executive Council. If a majority of those voting, vote in favor of the assessment, then the same shall thereupon become and be a lawful charge against the individual members of all local lodges.

All moneys received on a Grand Lodge assessment shall be used only for the purpose specified on the ballot calling for the same, except it be approved by a two-thirds vote on a general referendum.

Assessment Rates

SEC. 3. In the event of an assessment being levied by the Grand Lodge, apprentices shall be required to pay only one-half (½), and machinists helpers and production workers shall be required to pay only sixty-five per cent (65%) of the assessment levied upon journeymen machinists.

ARTICLE XI

Benefits

Strike and Lockout Donations.

SECTION 1. Members of local lodges who have been in continuous good standing for at least six months and who have ceased work on account of a grievance theretofore approved by the Executive Council, or who have been victimized and have satisfied the Executive Council that by reason of this discrimination they are unable to secure employment, shall receive such donations from the Grand Lodge as may be determined by the International President and Executive Council according to the amount of funds available for such purposes.

292 No donations shall be paid unless the strike or victimization extends over a period of more than two weeks; thereafter donations shall be paid in the amount determined upon by the International President and Executive Council.

Members of local lodges on strike or victimized, but not at the time entitled to donations because lacking the six months' membership required herein, shall be entitled to receive donations from the Grand Lodge, as may be determined by the International President and Executive Council, as soon as they have been in good standing membership for the six months' period required herein.

The payment of donations provided for in this section may be

denied or terminated at any time by the International President and Executive Council when, in their opinion, the funds of Grand Lodge do not warrant the expenditure.

Any donations paid by Grand Lodge shall be divided or apportioned to members on strike or who may be victimized in the same ratio as per capita tax is paid upon said members.

Deduction for Arrearages

SEC. 2. Whenever a member of a local lodge claiming strike or victimized donations is in arrears for dues or assessments, or "Labor" subscriptions the General Secretary-Treasurer may deduct from such donations an amount sufficient to pay all such arrearages.

Method of Payment

SEC. 3. Whenever a strike has been ordered or approved by the Grand Lodge each local lodge member affected thereby shall sign the strike record semi-weekly. From the names appearing on the strike record the secretary of the local lodge shall make up a weekly roll showing the names of the individuals on strike or who may be victimized.

After the weekly roll has been approved by the signatures of the president, financial secretary and recording 293 secretary of the local lodge it shall be forwarded to the General Secretary-Treasurer, who, after examination thereof, shall return the same, together with a check of the Grand Lodge covering the amount of any donation made to such roll, which check shall be drawn payable to the president, financial secretary and recording secretary of the local lodge.

Each individual receiving a donation from the Grand Lodge must receipt for the same upon the duplicate roll provided, after which the secretary shall return one copy of said roll to the General Secretary-Treasurer for the files of the Grand Lodge, and place one copy on local lodge files. Except in cases where the distance and time required for the transportation of the mails makes the rule impracticable, the General Secretary-Treasurer shall not forward a check covering a subsequent donation before the receipted roll for the previous week has been received by him. No claim for any donations under the provisions of this section shall be considered or allowed unless presented to the General Secretary-Treasurer within thirty days from the date on which said donations were due.

No donations shall be paid to any individual who refuses to do the duty assigned to him by those in charge of the strike.

Death Benefits

SEC. 4. Upon receipt of proof of the death of a member of any local lodge, duly attested by the signatures of the president and

financial secretary of said lodge on blanks furnished for that purpose by the General Secretary-Treasurer, to which the seal of the local lodge is affixed, the Grand Lodge shall pay the death benefits based upon the rate of per capita tax paid upon the designated member and the period of his continuous good standing membership in a local lodge or local lodges at the time of his demise.

(a) The death benefit for all members in good standing prior to April 1, 1937, of local lodges upon whose membership the full rate of one ($1) dollar per month per capita has been paid to the Grand Lodge shall be paid upon their period of continuous good standing membership as follows: Three (3) years, fifty ($50) dollars; four (4) years, seventy-five ($75) dollars; five (5) years, one hundred ($100) dollars; six (6) years, one hundred and twenty-five ($125) dollars; seven (7) years, one hundred and fifty ($150) dollars; eight (8) years, one hundred and seventy-five ($175) dollars; nine (9) years, two hundred ($200) dollars; ten (10) years, two hundred and twenty-five ($225) dollars; eleven (11) years, two hundred and fifty ($250) dollars; twelve (12) years, two hundred and seventy-five ($275) dollars; thirteen (13) years, three hundred ($300) dollars.

The provisions of this section do not change, in any way, the accrued death benefit to which members were entitled under the constitution as in effect in 1928; but it does operate to extend the time before any increase in such benefits will accrue to members of less than ten years' standing.

(b) The death benefit for all members initiated or reinstated after March 31, 1937, upon whose membership the full rate of one ($1) dollar per month per capita has been paid to the Grand Lodge shall be paid upon their period of continuous good standing membership as follows: Three (3) years, fifty ($50) dollars; five (5) years, seventy-five ($75) dollars; seven (7) years, one hundred ($100) dollars; nine (9) years, one hundred and twenty-five ($125) dollars; eleven (11) years, one hundred and fifty ($150) dollars thirteen (13) years, one hundred and seventy-five ($175) dollars; fifteen (15) years, two hundred ($200) dollars; seventeen years, two hundred and twenty-five ($225) dollars; eighteen (18) years, two hundred and fifty ($250) dollars; nineteen (19) years, two hundred and seventy-five ($275) dollars; twenty (20) years, three hundred ($300) dollars.

(c) The death benefit for apprentices upon whose membership only one-half (½) of the full rate of per capita tax has been paid to the Grand Lodge shall be only one-half (½) of the respective amounts set forth under subdivisions (a) and (b) of this section.

(d) The death benefit for all machinist helpers and production workers upon whose membership only sixty-five (65) cents per month per capita tax has been paid to the Grand Lodge shall be sixty-five per cent (65%) of the respective amounts set forth under subdivisions (a) and (b) of this section.

No death benefits shall be paid upon the death of any
295 member who was fifty (50) years of age, or over, at the date of his initiation, or at the date of his last reinstatement as a member of a local lodge of T[illegible] International Association of Machinists. (This provision does not apply to a person who was initiated, or reinstated in a local lodge prior to January 1st, 1917, and who has remained in continuous good standing to the date of his death.)

The term "continuous good standing" as used in this Article designates members of local lodges who are credited and reported to the Grand Lodge as receiving regular monthly due stamps. Members receiving unemployment stamps provided for in Article XII of this Constitution are not entitled to accumulated benefits covering the months for which said unemployment stamps are accepted. All unpaid "Labor" subscriptions shall be deducted from benefits due.

Exemption Cards

SEC. 5. Any member of a local lodge who has been in continuous good standing for thirty (30) years and has become so afflicted or disabled as to prevent him from actively performing the duties of a machinist, or who has been discriminated against for his activities as an organizer, Business Agent, or other official work, and is in consequence unable to obtain employment; or any member who has been continuously in good standing f[illegible] thirty (30) years and has reached the age of sixty-five (65) years, shall upon leaving the trade and upon request therefore be granted a card exempting him from further payment of dues and assessments. The issuing of such an exemption card shall not deprive the member of the death benefits provided for in this article. Members retired on pension, who are not entitled to exemption cards, shall pay full dues for six months per year and shall receive unemployed stamps for the ~~other~~ six months.

Death Benefits—To Whom Paid

SEC. 6. All death benefits payable under the provisions of Section 4 of this Article shall be paid to the next of kin of the deceased in the following order:

(a) To the wife or husband of the deceased.
296 (b) To the child or children of the deceased.
(c) To the parent or parents of the deceased.
(d) To the brothers and sisters of the deceased.

In any case where a dispute arises as to who is entitled to the benefits herein provided for, the payment thereof to the administrator, executor, or any relative of the deceased, shall fully release the Grand Lodge of its obligations hereunder.

Absence of Relatives

SEC. 7. When a member of a local lodge dies, whose burial is not otherwise provided for, the local lodge of which he was a member at the time of his demise, or any local lodge in the locality where he dies, may arrange for his funeral or interment, which local lodge shall thereafter be reimbursed by the Grand Lodge for all reasonable expenses up to the amount of the death benefits of the deceased. The remainder of such death benefits, if any, shall be held by the Grand Lodge subject to any legal claim therefor.

Membership Cancelled

SEC. 8. Delinquency for three (3) months in the payment of dues or assessments shall automatically cancel membership in a local lodge of this Association and all rights, privileges and benefits incident thereto. The period of good standing membership of any person whose membership has been cancelled for delinquency, or other cause shall date from the date of his last reinstatement in a local lodge, as shown by the Grand Lodge records, and his rights, privileges and benefits under the provisions of this Constitution shall attach and date from the date of his last reinstatement, as though he had never before held membership in a local lodge of this Association.

Sick Benefits

SEC. 9. No sick benefits are paid by the Grand Lodge, but any local lodge of The International Association of Machinists may provide in its by-laws for the payment of sick benefits to its
297 members, subject, however, to the approval of the provisions therefor by the International President.

ARTICLE XII

Unemployment Stamps

SECTION 1. Any member of a local lodge, who without fault on his part, is unemployed for the major portion of any month, and therefrom suffers a total or proportionate loss of earnings, due to separation from employment, lay-off or furlough, sickness or disability, is entitled to an unemployment stamp for that month and is thereby excused from the payment of the regular monthly dues, upon complying with the following conditions relating thereto.

(a) He shall register his name and address in the out-of-work book each week during the period of his unemployment, or in case of disability he shall communicate the fact to the financial

secretary or business agent of the local lodge of which he is a member. Members who are sick shall not be required to register personally in the "out-of-work book."

(b) His monthly dues and assessments must be paid within the three months limit as provided for in Section 8 of Article XI.

(c) He shall make application for the unemployed stamp before the expiration of three months from the month during which his last monthly dues were paid.

(d) The financial secretary shall place the unemployed stamp in the square of the month next following that of the month in which the last due stamp was placed.

Conditions of Issue

SEC. 2. Unemployment stamps shall not be issued to members of local lodges who are on vacation or engaged in any business or profession outside of the machine industry. Not more than six unemployment stamps shall be issued to any member of a local lodge during any consecutive twelve month period, unless consent of the Executive Council has been first obtained therefor, except that:

Any member of a local lodge, who has retired from active employment at the trade or from regular employment
298 for hire, or is receiving pension, or annuities provided by Civil Law, in an amount of $50.00 or less per month, shall be allowed continuous unlimited use of unemployment stamps by paying the amount charged therefor by the Grand Lodge. Members who have received unemployment stamps shall, immediately upon securing employment, report to the financial secretary or business agent of the local lodge. Unemployment stamps are issued for the purpose of aiding members of local lodges to maintain their good standing in their respective lodges, but shall not increase the liability of the Grand Lodge for accumulated death benefits for the months covering which the unemployment stamps have been accepted.

Strike Stamps

SEC. 3. Any member who has ceased work on account of a grievance theretofore approved by the Executive Council is entitled to receive strike stamps covering the period during which he is without employment by reason therefor, free of cost, upon complying with the provisions of Section 1 of this Article and conforming to such other requirements as may be instituted for the good and welfare of those involved by the local lodge of which he is a member.

Violations

SEC. 4. Any member who violates any of the provisions of this Article or who obtains an unemployment stamp or strike stamp

by any false pretense or misrepresentation of the facts, shall be subject to such fines and penalties as may be decided upon by the local lodge of which he is a member.

ARTICLE XIII

Strikes

SECTION 1. In case of extreme emergency, such as a reduction in wages, or an increase in the hours of labor, where delay would seriously jeopardize the welfare of those involved, the International President may authorize a strike pending the submission to and securing the approval of the Executive Council. In all other cases the grievances must be submitted to the Executive Council and its approval therefor obtained before any strike may be declared by any local lodge or the members thereof; and any local lodge or members thereof failing to comply with the provisions of this Article shall forfeit all rights to strike donations or to other financial aid from the Grand Lodge during the entire period of the controversy.

299

Method of Declaring Strike

SEC. 2. Whenever any difficulty arises within the jurisdiction of any local lodge between its members and any employer or employers growing out of a reduction in wages, lengthening hours of labor, or other grievances incident to the condition of employment, or whenever any local lodge desires to secure for its members an increase in wages, a shorter work day, or other change in the conditions of employment, the local lodge having the greatest number of members involved shall call a meeting of all members directly affected to decide by secret ballot whether the proposed changes shall be accepted or rejected. A majority vote of those present and voting on the question shall decide. If as a result of this decision a strike vote is decided upon, it shall require a three-fourths vote, by secret ballot, of those in attendance and qualified to vote thereon, to declare a strike. Where groups of shops are classified under the jurisdiction of one local lodge, and when uniform demands, for the establishment and maintenance of uniform conditions in such classified groups of shops, have been formulated and adopted by constitutional action of the lodge, then all the qualified members of the lodge employed in such a classified group of shops, shall be entitled to vote on strike action affecting any particular shop in that classified group. Only individuals who have been members of a local lodge for more than six months shall be entitled to vote on the question of declaring a strike. If it is decided to reject the proposed reduction of wages, increased hours of labor, or other changes in the condition of employment, or if it is decided to demand an increase in wages, a shorter work day, or other,

change in the conditions of employment, the decision shall be submitted, either in writing or through a committee, or the
300 business agent, to the employer or employers and if the employees involved are unable to reach an agreement, the recording secretary of the local lodge shall prepare a full statement and history of the matters in controversy and forward the same to the International President, who shall thereupon in person or by deputy visit the local lodge where the controversy exists, and, with a member of the local lodge whose members are involved, investigate the controversy and if possible effect a settlement. Upon receipt of the statement and history of the matters in controversy from the recording secretary of the local lodge the International President shall prepare and forward a copy thereof to each member of the Executive Council, together with a request for their vote on the question of approving a strike of those involved to enforce their decision in relation thereto. Upon receipt of the vote of the members of the Executive Council the International President shall forthwith notify the local lodge of the decision of the Executive Council. No strike shall be declared by any local lodge or the members thereof without first obtaining the consent of the International President or the Executive Council therefor.

Discontinuance of Grievance

SEC. 3. Should any local lodge fail to receive the sanction of the Executive Council it shall hold a meeting and declare the grievance at an end. Continuing such grievance after failure to secure the sanction of the Executive Council shall be considered sufficient cause for the suspension of any local lodge and the members thereof from all rights and privileges, at the option of the Executive Council.

Declaring Off a Strike

SEC. 4. Any proposal to settle or declare off an existing strike must be presented at a regular or called meeting of a local lodge and decided by the majority vote, by secret ballot, of the members involved therein. Wherever the Executive Council decides that it is unwise to longer continue an existing strike, it may order all members of local lodges who have ceased work in connection therewith to resume work, and thereupon and thereafter all strike
301 donations shall cease, except that the International President, with the consent of the Executive Council, may continue the relief in special deserving cases.

Financing Strikes

SEC. 5. The Executive Council may draw upon the funds of the Grand Lodge to finance any strike or lockout.

Handling Unfair Work

SEC. 6. Whenever members of a local lodge have ceased work on account of a grievance theretofore approved by the Executive Council, and the employer is having work done in other places of employment, whether owned or controlled by such employer or not, members of local lodges employed in such other places of employment may be ordered by the local lodge or by the district lodge, if one exists in that locality, to cease doing such work or to cease working at such places. All such orders must be approved by the Executive Council to entitle members complying therewith to strike donations or victimized donations, as the case may be. In the event of the members of the local lodge not taking action to cease work as herein described, the International President, with the approval of the Executive Council, may order said members to cease work until the dispute is satisfactorily adjusted, or until ordered to return to work by the International President and the Executive Council.

ARTICLE XIV

District Lodges

SECTION 1. District lodges shall be established upon railroads, in industries where mutual shop interests require it, and in localities where two or more local lodges exist, for the purpose of securing mutual protection, harmonious action, and close co-operation in all matters relating to the machinist craft.

A district lodge is a delegate body made up of representa-
302 tatives duly elected from the local lodges within the railroad system, industry, or locality in which the district lodge is established.

All elective officers of District Lodges shall be elected in accordance with the District By-Laws.

Jurisdiction

SEC. 2. The jurisdiction of all district lodges shall be determined and defined by the Executive Council.

Each local lodge within such jurisdiction shall become affiliated with the district lodge unless specially exempted by said district lodge upon the approval of the International President and the Executive Council.

Representation and Revenue

SEC. 3. Each district lodge shall determine the proportion and method of representation therein of local lodges within its jurisdiction, and the revenues to be collected from said local lodges to maintain and carry on the work of the district lodge. All such revenues shall be collected by the financial secretaries of the local

lodges and forwarded to the district lodge officers authorized to receive the same. All officers of the district lodges having to do with the finances of the organization shall be bonded in the bonding and fidelity department of the Grand Lodge.

District lodges collecting revenue or receiving financial assistance shall render quarterly statements of receipts and disbursements to each local lodge within its jurisdiction and at the close of each three months' period shall forward to the International President a complete report on forms provided by him for that purpose.

Authority

SEC. 4. District lodges shall have authority over and control of all local lodges within their jurisdiction, subject to the approval, however, of the Grand Lodge. The bylaws of all district lodges, and the proposed amendments thereto, shall be submitted to the International President for his examination, correction, and
303 approval before final adoption. The provisions of this Constitution relating to local lodges and the constitution of local lodges of The International Association of Machinists shall, in so far as they are practical and adaptable, apply to and control all district lodges of The International Association of Machinists.

District Lodge Assessments

SEC. 5. In case of emergency district lodges may levy assessments upon all members of affiliated local lodges within their respective jurisdiction.

Assessments shall not be levied, however, until the same are approved by a two-thirds vote of all the members in the district in attendance and voting at a summoned meeting of their respective local lodges affiliated with the district, of which meetings, notice has been served to members in writing, by mail or otherwise, at least seven (7) days before date of meeting. In case the vote for assessment is carried by a two-thirds vote and date set for collection, the same shall thereupon become a lawful charge and all members of local lodges affiliated with the district are liable for the assessments, and the same shall be collected as per Article "I," Section 2, of the Grand Lodge Constitution governing assessments of local lodges of The International Association of Machinists. Suitable plans should be arranged by the district lodge, whereby the local lodges and individual members are provided with proper receipts for assessments paid.

ARTICLE XV

Business Agents

SECTION 1. The Grand Lodge shall establish and maintain business agencies upon railroads, in industries and localities whenever

the establishment and maintenance of the same is approved and authorized by the Executive Council: the Grand Lodge shall pay such part of the expense of business agencies as may be approved by the International President and Executive Council.

304 The amount paid by the Grand Lodge to Business Agencies and District Lodges, shall be in each case, the same percentage of the salary paid to the Business Agent or General Chairman; but in no case shall the amount so paid exceed $150.00 per month.

Control of Business Agents

SEC. 2. The International President, with the approval of the Executive Council, shall discontinue the financial support of the Grand Lodge in any case where, in his or its opinion, the conduct or results obtained by any business agent or agency are unsatisfactory. All business agents, whether they are or are not receiving financial assistance from the Grand Lodge, are under the supervision and subject to the orders of the International President and may be deputized by him to act as representatives of the Grand Lodge within or without their respective districts or localities.

Qualifications

SEC. 3. No member shall be permitted to serve as business agent unless he has been in continuous good standing for at least two years prior to his election and free from delinquencies of any nature to the Grand Lodge or any district or local lodges of The International Association of Machinists. No business agent is eligible to any other office in the gift of any district or local lodge, excepting that of delegate to conventions.

Reports

SEC. 4. On the last day of each week all business agents shall file with the International President a report of their activities, and on the first day of each month they shall file with the International President a statement of their expenses. Such expense statements shall be endorsed as approved by the district or local lodge, evidenced by the signatures of the president and secretary thereof.

305 SEC. 5. The work of all business agents shall be confined to the railroad, industry, or locality for which they are respectively elected, unless otherwise ordered by the International President or the Executive Council. While on special service, business agents shall be paid their actual expenses for railroad fare and hotel. The term of office of business agents shall be provided for in the by-laws of the district or local lodge.

ARTICLE XVI

Bonding Department

SECTION 1. The Executive Council shall establish and maintain a bonding and fidelity department, to be under the immediate supervision of the General Secretary-Treasurer, to be the surety on all bonds furnished by and for the financial officers of all district and local lodges.

The General Secretary-Treasurer shall, upon approval thereof by the International President and the Executive Council, issue a semi-annual report of the business transacted by the bonding and fidelity department and all of the books of such department shall be examined and made a part of the semi-annual Grand Lodge audit. The expenses incident to the maintenance of such department shall be paid from the income derived from the business transacted by the department.

Each district and local lodge shall obtain a bond for each of its financial officers through the General Secretary-Treasurer, with the bonding and fidelity department of the Grand Lodge as surety thereon and application therefor shall be made to the General Secretary-Treasurer upon blank forms furnished by him for that purpose.

All such bonds shall run for the period of one year and shall be transferable without additional costs to any successor or successors filling the office for which the bond is given during the period for which the bond is written. No such bond shall be for less than
$500 liability, and the premium charged thereon shall not
306 be in excess of $2.50 per year for the first $500 and 75 cents
per year for each additional $100 of liability of the surety thereunder.

Whenever any financial office in the district or local lodge becomes vacant by reason of resignation, death, or removal of any such officer, the books of the office shall be audited as soon as practicable by the trustees or auditors of such district or local lodge, and the recording secretary thereof shall immediately notify the General Secretary-Treasurer of the vacancy. Upon receipt of such notice the General Secretary-Treasurer shall forward an application blank to the recording secretary of the district or local lodge, and immediately after the election of an officer to fill the vacancy an application for the transfer of the bond for unexpired term shall be forwarded to the General Secretary-Treasurer.

ARTICLE XVII

Hold No Other Office

SECTION 1. No officer of the Grand Lodge or of any district or local lodge who is expected to devote his entire time to the duties of his office, shall accept any office or other position from any other

organization or institution unless it is such as will advance the common interests of the working classes, nor shall any member of any local lodge hold membership in the National Civic Federation.

Officers' Expenses

SEC. 2. All Grand Lodge officers, Delegates to the American Federation of Labor, Delegates to the Trades and Labor Congress of Canada, Members of the Law Committee, Grand Lodge Representatives and Grand Lodge Auditors shall be allowed actual and necessary transportation and hotel expenses when away from home on official business, subject to the approval of the International President and the Executive Council. During each and every week, all elected and appointed officers shall file with the International President, an itemized account of their expenses.

307 SEC. 3. The International President, our Vice-President, the General Secretary-Treasurer and the Editor of the Journal shall have Washington, D. C., designated as their headquarters and no hotel expenses shall be allowed while they are at headquarters, except when first elected or temporarily assigned there and then hotel expenses shall be allowed for a period not to exceed sixty days.

Vice Presidents

SEC. 4. All other International Vice Presidents shall be assigned to a home headquarters and no hotel expenses shall be allowed when stationed at such designated headquarters.

ARTICLE XVIII

The Referendum and Its Operation

Definition

SECTION 1. Wherever in this Constitution and in the constitution for local lodges reference is made to the "referendum," it is intended thereby to refer to the practice of submitting matters to a vote of the membership at large through the respective local lodges organized and chartered by and in good standing with the Grand Lodge of The International Association of Machinists.

How Invoked

SEC. 2. Any member or members of a local lodge in good standing with the Grand Lodge of The International Association of Machinists, shall have the privilege of proposing amendments to the Constitution, submitting any grievance that may arise, and proposing appeals from the decisions of the Executive Council, by submitting same to the General Secretary-Treasurer after having first received endorsement thereto under the seal of not less

than ten (10%) percent of all local lodges in good standing, not more than ten of which are located in any one state, province, or territory.

(The word "amendment" wherever used in the Constitution shall be taken to mean any addition to, changes, or cancellations of the Constitution of the Grand Lodge and the constitution of local lodges.)

Form of Amendments

SEC. 3. All proposed amendments to this Constitution shall be in such form as to state the substance rather than the exact language of the proposed addition, cancellation or change, that is, the purpose to be accomplished rather than the wording or the designation of certain articles or sections, and the General Secretary-Treasurer shall submit the same as provided in the next succeeding section with a clause attached thereto authorizing the necessary changes in the Constitution.

SEC. 4. Upon receipt of any such amendment, grievance or appeal, together with the endorsements thereof as required under Section 2 of this Article, the General Secretary-Treasurer shall cause the same to be printed in the form of a circular arranged in such a manner as shall allow each subject to be decided, to be voted upon separately and forwarded to the respective local lodges in sufficient numbers, so that each member in good standing in such local lodge shall have a copy at the first meeting of his lodge held in the month of January of each year following the receipt of the same, except in years when conventions are held under the provisions of Article IX of this Constitution.

Publication of Amendments

SEC. 5. All proposed amendments to the Constitution of the Grand Lodge and local lodges of The International Association of Machinists must be published in the Journal for two months prior to submission through the referendum as provided in Section 4 hereof. In order to enable the General Secretary-Treasurer to comply with the law a period of forty-five (45) days from
308 date of issue of the proposed amendments shall be allowed to secure endorsements. All endorsements received after
309 that period will be discarded.

Method of Voting and Returns

SEC. 6. Whenever a referendum vote is called by the General Secretary-Treasurer, each local lodge shall notify its members of the vote being called, and no ballot shall be accepted unless deposited between the date of January 1 and 31 of each year, according to the call. Within 72 hours after the casting of the

ballots the result of the vote shall be forwarded to the General Secretary-Treasurer on an official tally sheet therefor furnished by him and accompanied by all of the ballots cast by the members of the local lodge.

The perforated register slip containing the name, address, card number and local lodge number of the individual voter shall be retained by the local lodge for at least sixty days after the date of the election.

Fines for Neglect

SEC. 7. For failure to carry out the duties imposed upon him by the foregoing sections the General Secretary-Treasurer shall be fined not less than $25 nor more than $50, the amount to be determined by the Executive Council. The secretary of any local lodge who fails to carry out the duties imposed upon him by the foregoing section shall be fined not less than $2.00 or more than $5.00, the amount to be determined by his local lodge. The local lodge to which the secretary belongs shall collect and retain one-half (½) of the fine and forward the balance thereof to the General Secretary-Treasurer.

Publication of Votes and Amendments

SEC. 8. The General Secretary-Treasurer, upon receipt of the vote upon any proposed amendment, shall furnish a copy of the same, including the vote of each local lodge, to the Editor who shall publish the same in the next issue of the Journal. All
310 amendments so adopted shall be published monthly thereafter until the Constitution is revised and reprinted.

Special Meeting of Law Committee

SEC. 9. When considered necessary the International President and the Executive Council may call a meeting of the Committee on Law to meet during the month of March for the purpose of incorporation into the Constitution such changes as have been made therein by the submission of amendments through the referendum.

When in Effect

SEC. 10. Amendments so adopted shall become operative and in force upon the first day of the quarter succeeding the publication of the vote, and no amendments shall be submitted which provide that the same shall be immediately effective and in force. There shall not be initiated a proposal for revision or cancellation of an adopted Amendment to this Constitution until after such adopted Amendment has been in effect for one year.

Resubmission

SEC. 11. Any amendment which failed to receive the majority of votes shall not again be submitted through the referendum until twelve months have elapsed and then only after again complying with the provisions of this Article in relation to the submission of amendments.

Changes in Salaries and Per Capita Tax

SEC. 12. All changes in the salaries of Grand Lodge officers and the amount of per capita tax to the Grand Lodge must be submitted to the membership of the local lodges through the referendum for adoption.

311 ARTICLE XI

Delegates to the American Federation of Labor and Other National or International Affiliations

International President First Delegate

SECTION 1. The International President, by virtue of his office, shall attend all conventions of affiliated bodies as a regular delegate and act as chairman of the delegation.

Division of Votes

SEC. 2. The number of votes to which the Grand Lodge of The International Association of Machinists is entitled shall be equally divided among its delegates.

Salary

SEC. 3. Delegates to conventions of affiliated bodies shall receive $10.00 per day as compensation for time spent in attending such conventions.

ARTICLE XX

Individual Affiliations

SECTION 1. Any officer or representative of the Grand Lodge may receive the application of any machinist who is working in a locality where there is no local lodge of The International Association of Machinists for affiliation with the Grand Lodge. The applicant shall be obligated by the officer or Grand Lodge Representative who receives the application, and the application, together with an initiation fee of seven dollars and fifty cents ($7.50) shall be forwarded to the General Secretary-Treasurer, who, upon the receipt thereof, shall enter the applicant's name upon the record of Individual Affiliations of the Grand Lodge and issue a due book to the machinist so affiliated. All such individuals affiliated shall

pay two dollars ($2) per month dues directly to the Grand Lodge by forwarding the same to the General-Secretary-Treasurer.

SEC. 2. All of the provisions of this Constitution and of the constitution for local lodges shall, in so far as they are applicable, apply to and be binding upon all such affiliated members.

Provisions for Constitution for Local Lodges

SEC. 3. The Grand Lodge shall provide a constitution for the government and control of local lodges, and all local lodges organized and affiliated in the Grand Lodge of The International Association of Machinists shall be governed and controlled thereby. The constitution for local lodges may be amended in the same manner as provided herein for the amendment of the Grand Lodge Constitution and by no other method whatsoever.

Bylaws

SEC. 4. Each local lodge may adopt its own by-laws, provided that nothing is contained therein which is contrary to the provisions of the Grand Lodge Constitution or the constitution for local lodges. The proposed bylaws of all local lodges, and any amendments thereafter proposed, shall be submitted to the International President for examination, correction, and approval before adoption.

ARTICLE XXI

Improper Conduct

SECTION 1. Any member or members of any district or local lodge circulating or causing in any manner to be circulated any false or malicious statement reflecting upon the private or public conduct, or falsely or maliciously attacking the character, impugning the motives, or questioning the integrity of any officer of the Grand Lodge, or officer or member of any local lodge, shall be deemed guilty of conduct unbecoming a member and subject to fine or expulsion, or both.

SEC. 2. Any member or members of any local lodge who attempt to inaugurate or encourage secession from the Grand Lodge or any local lodge, or who advocate, encourage, or attempt to inaugurate any dual labor movement, or who violate the provisions of the Constitution of the Grand Lodge, or the constitution for local lodges, shall, upon conviction thereof, be deemed guilty of conduct unbecoming a member and subject to fine or expulsion, or both.

SEC. 3. The International President and Executive Council shall have authority to expel any member guilty of joining, or participating in any dual organization.

SEC. 4. It is the duty of any member of a local lodge, who has information of a violation of any provision of the Constitution of the Grand Lodge or the constitution for local lodges by any member of the local lodge of which he is a member, to immediately prefer charges in writing against such member, by filing the same with the president of such local lodge. The president of the local lodge with whom the charges are filed shall forthwith proceed to bring the accused to trial under the provisions of the Code, as set forth in Article K of the "Constitution for Local Lodges of The International Association of Machinists."

SEC. 5. In the event that any local lodge, or the members thereof, fail to proceed under the provisions of Section 4 of this Article, or fail or refuse to punish members thereof who are guilty of violating the provisions of the Grand Lodge Constitution or the constitution for local lodges, then, and in that event, any officer of the Grand Lodge or any local lodge, or members thereof, may prefer charges against such member or members by filing the same in writing with the International President. Upon the receipt of such charges the International President shall forward one copy thereof to the accused and one copy thereof to the president of the local lodge of which the accused is a member, together with an order commanding said local lodge to proceed to place the accused on trial under the provisions of the Code as set forth in Article K of the "Constitution for Local Lodges of The International Association of Machinists." If said local lodge fails or refuses, for fifteen (15) days thereafter, to proceed as ordered by the International President, then the International President shall notify the accused and the local lodge of which he is a member of the time and place, when and where the Executive Council will meet for the purpose of hearing evidence and trying the accused upon charges theretofore preferred. At such trial before the Executive Council, the accused shall be entitled to all of the privileges set forth in Section 3 of the Code hereinabove referred to.

314 Appeals

SEC. 6. Appeals may be taken from the decision of the International President to the Executive Council. Appeals may be taken from the decision of the Executive Council to a convention of the Grand Lodge, or to the membership at large by submission thereof through the referendum. All appeals shall be laid before the body to whom addressed through the General Secretary-Treasurer. Before any appeals can be taken from any decision of the Executive Council, the decision, and all orders of the Executive Council in relation thereto, must be fully complied with by all parties concerned therein, in order to entitle them to enter an appeal, and in no case shall any district or local lodge, or any individual member or members thereof, appeal to the civil courts for redress until after having exhausted all rights of appeal

under the provisions of this Constitution. No member of the Executive Council shall have a vote on any appeal on which he has already rendered a decision.

ARTICLE XXII

Revision of the Constitution

SECTION 1. Ninety days before the convening of any convention of the Grand Lodge of The International Association of Machinists the General Secretary-Treasurer shall notify all local lodges to elect a committee on the revision of Constitution. All proposed amendements to the Constitution of the Grand Lodge and the constitution of local lodges that come before any local lodge shall be referred to this committee for consideration and recommendation, and, upon the approval of any such proposed amendment by the local lodge, the committee on revision of the Constitution shall forward the same to the General Secretary-Treasurer at least forty-five (45) days prior to the date of the convening of the convention. All such proposed amendments that have been forwarded to the General Secretary-Treasurer forty-five (45) days prior to the date of the convening of the convention shall be compiled, printed in the form of a circular, and mailed by him to each local lodge thirty (30) days before the date of the convening of the convention.

315 No amendments to the Constitution to be submitted to a Grand Lodge Convention, which are received at Grand Lodge Headquarters, too late to be included in the printed circular as provided for in this section shall be referred to the Law Committee, or be dealt with by the Convention.

Meeting and Report of Committee on Law

SEC. 2. The Committee on Law shall meet at the place where the convention is to be held seven (7) days prior to the date of convening for the purpose of considering all amendments proposed by local lodges under the provisions of Section 1 of this Article. The findings and recommendations of the Committee on Law shall be reported to the convention as soon as practicable after the convening thereof.

Submission of Amendments to the Membership

SEC. 3. Immediately after the adjournment of the convention the Committee on Law shall furnish the General Secretary-Treasurer with copies of all amendments approved by the convention, compiled in the form of a ballot suitable for submission to the membership of all local lodges through the referendum. Within thirty (30) days thereafter the General Secretary-Treasurer shall call for a special referendum for the acceptance or re-

jection of all amendments approved by the convention. The provisions of Article XVIII of this Constitution shall control such special referendum, except that the endorsements thereof by local lodges required under Section 2, and the publication required under Section 3, shall not apply to such special referendum election, and the name of the month during which the ballots shall be cast as mentioned in Section 6 shall be changed to conform to the date required by the calling of the special referendum.

Compiling of Constitution

SEC. 4. Whenever a ballot has been taken upon changes in the Constitution as the result of recommendations made by a regular or special Convention of our Association, the Law Committee shall be called into Headquarters during the month of February to incorporate in the Constitution, the changes adopted by such referendum, and are authorized to revise and correct all such parts of the law as are affected by such changes in order that confliction as between law and law may be eliminated.

316

Compensation of Committee on Law

SEC. 5. The members of the Committee on Law shall receive the sum of twelve dollars ($12.00) per day when engaged in the performance of their duties at conventions or at the headquarters of the Grand Lodge of The International Association of Machinists.

ARTICLE XXIII

Beneficiary Department

SECTION 1. (a) The Beneficiary Department shall cease issuing Certificates of Death and Disability Benefits, at midnight official time, Washington, D. C., on March 31, 1941.

(b) The Beneficiary Department shall cease collection of all beneficial dues at midnight official time, Washington, D. C., on March 31, 1941, which action will automatically cancel all existing beneficiary certificates and will terminate any and all liability for payment of the $500.00 for death and disability, provided for in said certificates.

(c) All death claims and disability claims, the payment of which is valid on or before March 31, 1941, shall be paid; such payments shall be made in accordance with the terms and conditions of the beneficiary certificate in existence prior to April 1, 1941, and in accordance with the provisions of Article XXIII of the Constitution which was in effect from April 1, 1937 to March 31, 1941. The said payments shall be made in the manner hereinafter provided.

(d) Upon the death of any good standing member of the International Association of Machinists, who was the holder of a good

standing Death and Disability Benefit Certificate on March 31, 1941, the Beneficiary Department shall pay at the time of such member's death, to the named beneficiary or the estate, a sum
317 equal to the amount of beneficial dues paid by such member to the Beneficiary Department upon the last Death and Disability Benefit Certificate issued to such member, less ten per cent (10%).

The above referred to ten per cent (10%) shall be retained by the Beneficiary Department to the credit of the Beneficiary Expense Fund.

Sec. 2. (a) Sufficient funds shall be donated from the General Fund of the Grand Lodge to the Beneficiary Fund of the Beneficiary Department, to pay all valid unpaid Death and Disability claims outstanding against the Beneficiary Department as of midnight, March 31, 1941, as provided for in Sub-section (c) of Section 1 of this Article.

(b) Sufficient funds shall be currently donated from the General Fund of the Grand Lodge, not in excess of fifty thousand dollars ($50,000.00) annually, to the Beneficiary Fund of the Beneficiary Department, to provide for the refund of beneficial dues to good standing members of the Beneficiary Department, as of March 31, 1941, to be paid in accordance with Sub-section (d) of Section 1 of this Article.

(c) Sufficient funds shall be donated from the Grand Lodge General Fund to make up any deficit occurring in the Beneficiary Expense Fund of the Beneficiary Department. The amount of donations currently made to this fund shall be the difference between the ten per cent (10%) of the refund provided for in Sub-section (d) of Section 1 of this Article, and the minimum operating cost chargeable to the Beneficiary Expense Fund.

(d) The total amount of the donations provided for in Sub-sections (c) and (d) of Section 1 of this Article, shall be carried in the financial reports of the Grand Lodge as, "Donations from the General Fund to Liquidate Obligations of the Beneficiary Department".

(e) The Executive Council of the Grand Lodge is hereby instructed to provide the donations required by Sub-sections (a), (b), and (c) of Section 2 of this Article, by earmarking a sufficient amount of annual revenue of the Grand Lodge, to make available the entire amount of these donations over the necessary period of years, beginning with the calendar year of 1941.

(f) Nothing in this Article shall be held or construed to make liable, the General Fund or property of the Inter-
318 national Association of Machinists for any of the obligations of the Beneficiary Department, other than the donations herein provided.

(g) All Articles or Sections of the Grand Lodge Constitution, which may now or hereafter be in conflict with this Article are hereby amended to conform, or repealed.

ARTICLE XXIV

Pension Plan

SECTION 1. The Grand Lodge shall put into operation and maintain a pension plan covering all Grand Lodge elective officers, all Grand Lodge appointive officers, and all Grand Lodge employees.

SEC. 2 (a) On and after the adoption of this Article, in accordance with the provisions of the Grand Lodge Constitution, all eligible persons, as provided in Section 1 hereof, shall be entitled to the benefits of the pension plan, after they have rendered fifteen (15) years or more of service with the Grand Lodge, in one or more of the categories set forth in Section 1 of this Article.

(b) No person in the service of the Grand Lodge, as defined in Section 1 hereof, whose service terminated on or before the date this plan becomes effective, shall be eligible to participate in its benefits, except that those persons who have been and are now receiving a part of their regular salary and rendering part-time service, or who have been retired on pension, shall be eligible to receive a pension only under the terms and conditions of this Article.

SEC. 3. All persons covered by the pension plan as set forth in Section 1, hereof, may retire of their own volition at the age of sixty (60) years, and must retire at the age of seventy (70) years.

SEC. 4. The Executive Council may at any time place on pension any officer or employee, who having completed fifteen (15) years service in accordance with Section 2 hereof, is in its judgment unable by reason of age, illness, or physical incapacity, to carry on his or her duties in an efficient and satisfactory manner.

SEC. 5. (a) The pension of any member of the International Association of Machinists may be terminated upon conviction of violating the laws or principles of the International Association of Machinists, or for failing to maintain good standing membership in the Association. Members charged with such violations may be tried in accordance with the code of the Subordinate Lodge Constitution.

319

(b) Employees of the Grand Lodge who are not members of the International Association of Machinists, may have their pensions refused, suspended, or terminated for violations of the principles of trade unionism, or for discreditable conduct. In such cases a right of appeal shall lie to a Grand Lodge Convention.

SEC. 6. (a) The pensions payable by the Grand Lodge in accordance with this Article, shall be not more than one-half the average salary paid to eligible persons during the last ten years of their full time employment, prior to retirement, less the amount received from the Railroad Retirement Fund, or other annuities provided by Civil Law. Provided, however, that in no case, shall the amount of pension paid to any eligible person by the Grand Lodge, exceed $100.00 per month, nor shall the total amount of

the Grand Lodge pension payment, when added to the amount received from the Railroad Retirement Fund or annuities received pursuant to provisions of Civil Law, exceed a total amount of $200.00 per month.

(b) In the case of persons covered by this Article, whose pension computed on the basis set forth in Section 6 (a) hereof, aggregates less than $50.00 per month, then the amount of pension paid to such persons by the Grand Lodge, shall be a sum which added to the amount received from the Railroad Retirement Fund, or annuities provided by Civil Law, shall make such total pension $50.00 per month.

SEC. 7. Nothing in the foregoing regulation shall be construed to constitute a legal liability for the payment of pensions by the International Association of Machinists, or a legal right on the part of any officer or employee to require the payment of such pensions.

ARTICLE XXV

Authority Restricted

All authority and power not specifically delegated to the officers in this Constitution is reserved to the membership.

320 CONSTITUTION FOR LOCAL LODGES OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS

RULES OF ORDER

Rule 1. On motion, the regular order of business may be suspended by a two-thirds vote of the meeting at any time to dispose of anything urgent.

Rule 2. All motions (if requested by the chair) or resignations must be submitted in writing.

Rule 3. Any conversation by whispering or otherwise, which is calculated to disturb a member while speaking or hinder the transaction of business, shall be deemed a violation of order.

Rule 4. Sectarian discussion shall not be permitted in the meeting under any circumstances.

Motion

Rule 5. A motion to be entertained by the presiding officer must be seconded, and the mover as well as the seconder must rise and be recognized by the chair.

Rule 6. Any member having made a motion can withdraw it by consent of his second; but a motion once debated cannot be withdrawn except by a majority vote.

Rule 7. A motion to amend an amendment shall be in order, but no motion to amend an amendment to an amendment shall be permitted.

Debate

Rule 8. A motion shall not be subject to debate until it has been stated by the chair.

Rule 9. When a member wishes to speak he shall rise and respectfully address the chair, and if recognized by the chair, he shall be entitled to proceed.

Rule 10. If two or more members rise to speak at the same time the chair shall decide which is entitled to the floor.

321 Rule 11. Each member when speaking shall confine himself to the question under debate, and avoid all personal, indocorous or sarcastic language.

Rule 12. No member shall interrupt another while speaking except to a point of order, and he shall definitely state the point, and the chair shall decide the same without debate.

Rule 13. If a member, while speaking, be called to order he shall take his seat until the point of order is decided, when, if declared in order, he may proceed.

Rule 14. If any member shall feel himself personally aggrieved by a decision of the chair, he may appeal to the body from the decision.

Rule 15. When an appeal is made from the decision of the chair the Vice-President shall then act as chairman; said appeal shall then be stated by the chairman to the meeting in these words: "Shall the decision of the chair be sustained as the decision of this Lodge?" The member then will have the right to state the grounds of appeal, and the chair will give reasons for his decision; thereupon the members will proceed to vote on the appeal without further debate, and it shall require a majority to sustain an appeal.

Rule 16. No member shall speak more than once on the same subject until all the members desiring the floor shall have spoken, not more than twice without unanimous consent, nor more than five minutes at any one time without consent of a two-thirds vote of all members present.

Rule 17. The presiding officer shall not speak on any subject unless he retires from the chair, except on points of order, and in case of a tie he shall have the casting vote.

Privilege Questions

Rule 18. When a question is before the meeting no motion shall be in order except:

1. To adjourn.
2. To lay on the table.
3. For the previous question.
4. To postpone to a given time.
5. To refer or commit.
6. To amend; and these motions shall have precedence in the order herein arranged. The first three of these motions are not debatable.

Rule 19. If a question has been amended, the question on the amendment has been amended, the question on the amendment has been offered, the question shall then be put as follows:

1. Amendment to the amendment.
2. Amendment.
3. Original proposition.

322 Rule 20. When a question is postponed indefinitely it shall not come up again except by a two-thirds vote.

Rule 21. A motion to adjourn shall always be in order except:

1. When a member has the floor.
2. When members are voting.

Rule 22. Before putting a question to vote the presiding officer shall ask, "Are you ready for the question?" Then it shall be open for debate. If no member rises to speak, the presiding officer shall then put the question in this form: "All in favor of this motion say 'aye';" and after the affirmative vote is expressed: "Those of the contrary opinion say 'no'." After the vote is taken he shall announce the result in this manner: "It seems to be carried (or lost); it is carried (or lost) and so ordered."

Rule 23. Before the presiding officer declares the vote on a question, any member may ask for a division of the house. Then the chair is in duty bound to comply with the request, and a standing vote shall then be taken, and the secretary shall count the same.

Rule 24. When a question has been decided it can be reconsidered by a majority vote of those present.

Rule 25. A motion to reconsider must be made and seconded by two members who voted with the majority.

Rule 26. A member being ordered to take his seat three times by the chair without heeding shall be debarred from participating in any further business at that session.

Rule 27. All questions, unless otherwise provided, shall be decided in accordance with Robert's Rules of Order.

323

ARTICLE A

Definitions

A Local Lodge

SECTION 1. A local lodge shall consist of not less than fifteen (15) persons in any locality, qualified for membership and organized as a local lodge under a charter issued by the Grand Lodge of The International Association of Machinists.

A Machinist

SEC. 2. A "machinist" is a person who has served an apprenticeship of four (4) years at the machinists' trade; or a person who has worked for four (4) years at the machinists' trade in any of its branches or subdivisions, and who can, with the aid of tools,

with or without drawings, make, repair, erect, assemble or dismantle machinery or parts thereof.

Automobile and Aircraft Machinists or Mechanics

SEC. 3. An Automobile or Aircraft Machinist or Mechanic is a person who has served an apprenticeship of four (4) years at the Automobile or Aircraft Machinists' or Mechanics' trade; or a person who has worked for four (4) years at the Automobile or Aircraft Machinists' or Mechanics' trade in any of its branches or subdivisions, and who can, with the aid of tools, repair, erect, assemble, dismantle, and maintain Automotive or Aircraft equipment or parts thereof.

A Specialist

SEC. 4. A specialist is a person who is employed in some branch or subdivision of the machinists' trade, or a person who performs some particular line of work commonly recognized as work connected with the machinists' trade or the metal industry.

324 Machinist Helper

SEC. 5. A "machinist helper" is a person employed in the machine or metal industry in any of its branches or subdivisions and assigned to assist a mechanic in the machinists' trade in the performance of his duties and who is competent to command the minimum rate of wages paid in the locality where he is employed.

An Apprentice

SEC. 6. (a) An indentured "apprentice" is a person who, while between sixteen (16) and twenty-one (21) years of age, is engaged to an employer to serve four (4) years in learning the machinists', automobile or aircraft machinists' or mechanics' trade.

(b) A "helper apprentice" is a person who having been a member of a local lodge for at least one (1) year and having worked at least one (1) year as a machinist helper has thereafter, and while under the age of thirty-five (35) years, engaged himself to an employer to serve four (4) years in learning the machinists' trade.

Production Worker

SEC. 7. In the Machinists' craft a production worker is a person employed in the mass production metal industry engaged in repetitive machine work or assembly work, or bench work, requiring less training, experience and skill than that necessary to qualify one as a machinist.

ARTICLE B

Organization of Local Lodges

SECTION 1. Every application for a charter for the organization of a local lodge of The International Association of Machinists must be signed by at least fifteen (15) applicants who possess the qualifications for membership and are working in a locality where there are a sufficient number of machinists, automobile or aircraft machinists or mechanics, specialists, machinist helpers, apprentices and production workers employed to maintain a local lodge.

325

Fees

SEC. 2. A fee of not less than five dollars ($5.00) shall be charged to each applicant. A charter fee of not less than twenty-five dollars ($25.00), payable to the Grand Lodge, shall accompany every application for a charter, except in the case of an application for a charter organizing a machinist helpers lodge, when the charter fee shall be not less than fifteen dollars ($15.00). The Grand Lodge is entitled to and shall receive the sum of two dollars ($2.00) from each applicant after the first one hundred (100) charter members are enrolled. Charters may be closed at any time within (30) days, but in no case shall charter members be enrolled after that period.

Form of Application

SEC. 3. Every application for a charter for the organization of a local lodge shall contain the following information: (a) The number of machinists, automobile or aircraft machinists or mechanics, specialists, machinist helpers, apprentices and production workers employed in the locality. (b) The name of each applicant who is a member in good standing of any local lodge, together with his card number and the number of the local lodge to which he belongs. (c) The name of each applicant whose membership has been previously cancelled, together with the number of the local lodge of which he was last a member. (d) The petition and pledge of the applicants in language as follows:

"The undersigned residents of (place) _____ (State) _____ believing The International Association of Machinists to be well calculated to improve our intellectual and social conditions and promote our industrial well-being and advancement, respectfully petition The International Association of Machinists to grant us a charter to open a new lodge, to be located in the (town or city) of _____, county of _____, State of _____. We pledge ourselves individually and collectively to be governed by the Constitution, laws, rules and usages of The International Association of Machinists. The Lodge desires to be recognized as _____ Lodge."

326 Granting Charter

SEC. 4. Every such application for a charter shall be forwarded to the General Secretary-Treasurer, who shall submit the same to the International President. If the application is approved by the International President, he shall cause the charter to be granted and designate a member as the representative of the Grand Lodge to install the officers and instruct the members of such local lodge in the principles, usages, and laws of The International Association of Machinists.

Restrictions

SEC. 5. No application for a charter shall be granted which proposes to separate any local lodge into two or more local lodges unless the application has been approved by a called meeting of the local lodge or lodges in the locality mentioned in the application.

Who May Obtain Charters

SEC. 6. In localities where there are a sufficient number of machinists, die sinkers, die or tool makers, automobile or aircraft machinists or mechanics, specialists, production workers, or machinist helpers employed in any one or more divisions of the trade, separate local lodges may be organized for the benefit of those employed in the respective divisions.

In localities where there are not a sufficient number of machinists, die sinkers, die or tool makers, automobile or aircraft machinists or mechanics, specialists, production workers, or machinist helpers employed in any one or more divisions, a mixed local lodge may be organized, with a membership composed of persons employed in all divisions of the trade.

No local lodge of machinist helpers shall be organized without first obtaining the sanction of the district lodge, or of the local lodge or lodges of that locality, if no district lodge exists.

No local lodge charter shall be granted by the International President in a locality within the jurisdiction of a district
327, lodge, until such district lodge has been consulted, and in the event of failure to reach an agreement, the Executive Council shall be required to render a decision as to whether such charter shall be granted or not.

Membership Cancelled

SEC. 7. Whenever persons whose membership in this Association has been cancelled apply for charter membership in a local lodge in process of organization, it shall be the duty of the Grand Lodge Representative to collect the charter fee from such persons and forward the same, together with their applications, to the General Secretary-Treasurer, who, upon ascertaining that there

are no unpaid fines or assessments against them, shall prepare their reinstatement books and credit the amount paid into the Grand Lodge.

Bylaws

SEC. 8. Each local lodge may adopt its own by-laws, provided that nothing is contained therein which is contrary to the provisions of the Grand Lodge Constitution or the constitution for local lodges of The International Association of Machinists. The proposed by-laws of all local lodges and all amendments thereafter proposed, except as to time and place of meeting, shall be submitted to the International President for examination, correction, and approval before being adopted.

Parliamentary Laws

SEC. 9. The Rules of Order governing parliamentary procedure shall be printed in the copies of the Constitution of the Grand Lodge, and no other rules shall apply.

Meetings and Quorums

SEC. 10. Each local lodge shall hold at least two (2) regular meetings during each month and shall determine how many of its members shall constitute a quorum, provided it be not less than five. Special meetings shall be called by the president upon the written request of ten per cent (10%) of the members of a local lodge, provided, however, that a special meeting shall be called upon the written request of one hundred (100) members, and no special meeting shall be called on the written request of less than ten (10) members, regardless of the total membership of such local lodge.

The call for special meetings of local lodges shall state the purpose of the meeting, and discussion and action at such special meetings shall be confined to the subject for which the meeting was called.

Order of Business

SEC. 11. The order of business for each local lodge shall be as follows:

1. Roll call of officers and noting of absentees.
2. Reading and approval of minutes.
3. Introduction of visiting members.
4. New applications.
5. Report of committees on applications.
6. Initiation.
7. Communications, bills, etc.
8. Report of committees.
9. Report of members out of work and positions vacant.

10. Good and welfare of the Association and discussion of subjects of an economic nature.
11. Unfinished business.
12. New business. Election of officers.
13. Report on sick and disabled members and of Relief Committee.
14. Installation of officers.
15. Report of secretary and treasurer, including receipts and disbursements since the close of the last meeting.

Local Lodge Seal

SEC. 12. Each local lodge shall procure a seal from the General Secretary-Treasurer, which seal shall be made in accordance with the design adopted by the Grand Lodge of The International Association of Machinists. The local lodge seal shall be and remain in the custody of the recording secretary, and no paper, document, or communication issued by the local lodge shall be valid unless it bears the impression of said seal.

329

Illegal Use of Seal

SEC. 13. Any officer or member of a local lodge who uses the seal of such lodge for any purpose without permission from the lodge shall be fined, suspended, or expelled, at the option of the local lodge of which he is a member.

Grand Lodge Control Over Property

SEC. 14. In case of the suspension, revocation of the charter, expulsion, lapsing, or disbanding of any local lodge for any cause or reason whatsoever, it shall be the duty of the recording secretary, acting in conjunction with the trustees, to send all funds and property belonging to such local lodge to the General Secretary-Treasurer of the Grand Lodge to be held by him, intact, for a period of at least six (6) months. If within that period application is made therefor by at least fifteen (15) members in good standing in that locality, such local lodge shall, with the approval of the International President and the Executive Council, be reopened and the funds and property returned thereto. And in the event that such local lodge is not reopened, all funds and property shall belong to and become the property of the Grand Lodge.

Funds and Property of Merged Lodges

SEC. 15. Whenever two or more local lodges merge or consolidate, the stamps, funds, and property of such merged lodges shall be sent to the Grand Lodge. After the accounts of the merged lodge or lodges are balanced, such balance as remains shall be returned by Grand Lodge to the local lodge created by such merger, or consolidation.

ARTICLE C

Officers of Local Lodges

SECTION 1. The officers of all local lodges shall consist of a president, a vice president, a recording-secretary, a financial secretary, a treasurer, a conductor, a sentinel, a board of trustees consisting of three (3) members, and a past president who shall be the statistician.

320

Terms of Officers

SEC. 2. Officers of newly organized local lodges shall hold office until the first meeting in January following their election, and thereafter the term of office shall be for one year, except that at the first regular election of any local lodge one trustee shall be elected for a term of six (6) months, one for a term of twelve (12) months, and one for a term of eighteen (18) months. Thereafter their successors in office shall be elected for a term of eighteen (18) months, resulting in the election of one trustee every six months. The retiring president shall be the past president and statistician for the ensuing year. In newly organized local lodges, or in the case of a vacancy, the president shall appoint a past president, who shall be the statistician.

Qualifications for Office

SEC. 3. Except at the first regular election of officers of a local lodge, all candidates for any elective office must be members of the local lodge in good standing for at least one year and free from delinquency of any nature to the Grand Lodge or any district or local lodge of The International Association of Machinists.

Further, any officer of a local or district lodge, who shall be found to be indebted to any such local or district lodge by reason of any shortage of any funds, accounts or securities intrusted to him for any purpose or purposes whatsoever, shall immediately forfeit his office and thereafter be permanently disqualified from holding any office within the province of any such local or district lodge of The International Association of Machinists.

Local or District Lodge Elections and Appointment of Tellers

SEC. 4. Whenever a local or district election is held by a referendum and there are more than two candidates contesting for election, the lodge or district may by a majority vote decide in advance that the candidates who receive the highest vote shall be declared elected and in such elections men at outlying points and employed on shifts that prevent their attendance at meeting will be permitted to vote by mail.

331 In all other cases where the voting is done in the lodge room exclusively a majority of all votes cast will be required for a decision and the president in both cases shall appoint three (3) tellers to assist in conducting the election in a fair and impartial manner.

Election of Officers

SEC. 5. Each local lodge, at its first meeting in the month of December shall elect a president, a vice president, a recording secretary, a financial secretary, a treasurer, a conductor, a sentinel, and one member of the board of trustees. Local lodge officers must be citizens of a country included in the territorial jurisdiction of the International Association of Machinists. No member shall hold more than one office.

Installation

SEC. 6. The installation of officers shall take place at the first meeting of the local lodge held in the month of January and after the report of the auditing committee. The ceremony of installation shall be conducted by the past president.

ARTICLE D

Duties of Officers

President

SECTION 1. The president shall preside at all meetings of the local lodge, decide all questions or disputes not controlled by laws of the Association, countersign all orders properly drawn on the treasurer, and all checks properly drawn by the treasurer, and enforce all of the laws of the Association applicable to local lodges and members thereof, appoint all committees not otherwise provided for, and in case of a tie he shall cast the deciding vote. He shall administer the obligation to all new members and perform such other duties as may be required of him by the Constitution of the Grand Lodge and the constitution for local lodges.

332 ### Vice President

SEC. 2. The vice president shall see that all persons entering the lodge room are members in good standing of some local lodge or affiliated with the Grand Lodge of The International Association of Machinists; he shall see that all property of the local lodge has proper care and shall assist the president in maintaining order; he shall preside at all meetings in the absence of the president, and in case of the death, removal, or resignation of the president, the vice president shall become president and serve as such until after the next regular election and installation of his successor in office.

Recording Secretary

SEC. 3. The recording secretary shall conduct all of the correspondence for, and in the name of the local lodge; he shall present all communications and bills to the local lodge and deliver such bills to and for the files of the financial secretary; he shall forward all grievances, draw all orders on the treasurer when passed by the local lodge and attest the same by his signature and by attaching the seal of the local lodge thereto; he shall prepare and sign all credentials of delegates and alternate delegates to conventions of the Grand Lodge and forward duplicates thereof to the General Secretary-Treasurer; he shall have charge of the roll-books furnished by the Grand Lodge and enter therein a complete list of the members of the local lodge, including the respective card numbers and residence addresses of such members; he shall perform such other duties as are required of him by the Constitution of the Grand Lodge and the constitution for local lodges of The International Association of Machinists.

Financial Secretary

SEC. 4. The financial secretary shall collect all dues, fines, assessments, and all moneys from any source for the benefit of the local lodge. Moneys collected by local lodge financial secretaries on behalf of the Grand Lodge, as indicated on monthly reports, shall be used for no other purpose and must accompany the report. He shall keep a systematic account of all disbursements and in such a way as to show the balance of cash on hand at the close of each meeting of the local lodge; he shall have on file all receipted bills, and shall submit his books to the auditing committee of the local lodge at the end of each three (3) months' period; he shall turn over all moneys received by him since the close of the last meeting to the treasurer of the local lodge at the close of each meeting and take the receipt of the treasurer therefor; he shall keep a correct account between the lodge and its members, and shall notify any member who has become two (2) months in arrears. At the end of each month the financial secretary shall prepare a monthly report in duplicate, one of which shall be sent to the General Secretary-Treasurer. The duplicate report shall contain in detail the names, card numbers and amounts paid by all members of the local lodge and designate the months for which such payments were made. He shall remit to the General Secretary-Treasurer an amount equal to the per capita tax called for by the current monthly report. The monthly report shall include a correct statement of the number of members on the books of the local lodge, and shall set forth in detail all additions made and subtractions from the membership roll, together with a list of members who have been expelled and individuals whose applica-

tions have been rejected, with the reasons therefor; he shall receive from the General Secretary-Treasurer due stamps in proportion to the per capita tax paid upon each monthly report. In reporting persons whose membership is cancelled on the rolls, the financial secretary shall state whether there are any unpaid fines or any local lodge or district lodge assessments charged against the person's account. Unless the report states otherwise, the cause for such cancellation of membership shall be considered the non-payment of dues, and they may be again reinstated as provided for in Section 18 of Article F of the constitution for local lodges.

(a) Financial secretaries receiving dues from members working under the jurisdiction of another local lodge shall immediately notify the secretary of the lodge under whose jurisdiction the member is working, with full particulars as to name, card number, etc.

334 Transfers

SEC. 5. When accepting members by transfer, the financial secretary shall enter the date and particulars of such transfer in the member's due book and shall at once notify the General Secretary-Treasurer of such transfer on the official notification of transfer form furnished by the Grand Lodge. If a member of a machinist helpers local transfers and reclassifies as an apprentice in a machinists local, that fact should be stated in the notices provided for in this section. A failure upon the part of any financial secretary to comply with this section shall subject him to a fine of two dollars ($2.00).

Report to the Grand Lodge

SEC. 6. Upon the receipt of reinstatement, or initiation fees, or dues, the financial secretary shall place the regular stamps received from the Grand Lodge for that purpose in the due book of the member making the payment, and shall cancel the stamps with the regulation cancelling stamp, showing date of payment and lodge number. Any financial secretary granting reinstatement books to persons whose membership has been cancelled in other local lodges shall subject his lodge to a fine of two dollars ($2.00) for each offense, which fine shall be payable to the Grand Lodge. The report of the financial secretary shall be signed by the president of the local lodge, bear the impression of the local lodge seal and shall be forwarded to the General Secretary-Treasurer immediately after the close of the month's business. Checks to cover monthly reports of local lodges must accompany the report. Should the monthly report of any financial secretary fail to reach the General Secretary-Treasurer by the tenth (10th) day of the month following the month reported, the local lodge shall be subject to a fine of two dollars ($2.00) for each offense, which

fine shall be payable to the Grand Lodge. Should the report of the financial-secretary fail to reach the General Secretary-Treasurer before the expiration of the month following the month reported, the General Secretary-Treasurer shall thereupon notify the president of such local lodge of its suspension. A bond shall be obtained for the financial secretary through the General Secretary-Treasurer, with the bonding and fidelity department of the Grand Lodge as surety thereon.

225

District Per Capita Tax

SEC. 7. The financial secretary shall obtain and draw an order on the treasurer of the local lodge at the close of each month for the amount of per capita tax due the district lodge with which such local lodge is affiliated and forward the same to the financial secretary of the district lodge.

Treasurer

SEC. 8. The treasurer shall receive all funds of the local lodge, give his receipt as evidence of the receipt thereof, and deposit the same in a bank of sound financial standing in the name of the local lodge. He shall pay all orders properly drawn on him by check, which checks shall be countersigned by the president of the local lodge. He shall not draw any checks whatever in violation of Section 4 of Article D. A bond shall be obtained for the treasurer through the General Secretary-Treasurer, with the bonding and fidelity department of the Grand Lodge as surety thereon.

Conductor

SEC. 9. The conductor shall examine all persons present prior to the opening of all meetings of the local lodge for the purpose of ascertaining whether any are in attendance who are not entitled to remain. He shall report to the president all members present who are in arrears for dues.

Sentinel

SEC. 10. The sentinel shall answer all alarms at the door, report the same, and admit all who are entitled to admission.

Past President and Statistician

SEC. 11. The past president and statistician shall attend all meetings of the local lodge, assist in initiations, instruct new members, and assist in securing a strict observance of all of the laws of the Association. He shall examine all applicants and visiting members as prescribed in the ritual.

336 **Auditors**

SEC. 12. At the last meeting in the months of March, June, September and December of each year, each local lodge shall elect an auditing committee, composed of three (3) members of the local lodge. Officers of the local lodge are not eligible to election as members of the auditing committee. The auditing committee shall immediately after the close of each quarter, proceed with the work of examining the books and accounts of the local lodge for the preceding three (3) months period. They shall call on the financial secretary for the duplicate financial statement, from which they shall proceed to take off a statement of the stamps used during the term they are about to examine, and tabulate the same on forms furnished therefor by the General Secretary-Treasurer.

The auditing committee shall render its report on a blank form furnished for that purpose by the General Secretary-Treasurer, and shall send a copy thereof to the Grand Lodge. The report of the auditing committee must be countersigned by the trustees of the local lodge. Should one or more auditors fail to be in attendance the trustees shall proceed with the work as though all of the auditing committee were present.

Trustees

SEC. 13. The Board of trustees shall have charge of all property belonging to the local lodge; shall see that all of the books are properly kept, and at the expiration of each quarter, shall assist the auditing committee in the examination of all books and accounts and verify the report of the auditing committee by attaching their signatures thereto. Should the work of auditing the books of the local lodge be delayed on account of the failure of one or more of the trustees to be in attendance, the auditors shall proceed to carry on the work in the same manner as though all of the trustees were present. The trustees of each local lodge shall be liable to the Executive Council of the Grand Lodge for all funds and other property of the local lodge under their control. A bond shall be obtained for all trustees who have $200.00 or more under their custody and control through the General
337 Secretary-Treasurer with the bonding and fidelity department of the Grand Lodge as surety thereon.

ARTICLE E

Duties of Local Lodges

Minimum Wage Scales

SECTION 1. Local or district lodges shall establish a minimum scale of wages in their respective localities for members employed as machine erectors, and no member of any local lodge shall accept

work as a machinery erector under the minimum wage established for the locality wherein he is employed.

Local and district lodges may also establish minimum wage rates in their respective localities wherever they are in position to enforce such rates, subject to the approval of the Executive Council.

Economics

SEC. 2. Each local lodge may discuss subjects of political economy under the heading "Good and Welfare," providing such discussion does not occupy more than twenty (20) minutes of the time of the meeting and does not include matters sectarian in religion or partisan in politics.

Legislative Committee

SEC. 3. Each local lodge shall appoint a committee of three (3) members, to be known as the legislative committee, which committee shall assist in securing the enactment of legislation favorable to labor. The legislative committee shall gather information on all such laws enacted, the persons who have favored or opposed the same and from time to time forward such information to the editor of the Machinists' Monthly Journal.

Relief Committee

SEC. 4. The president of each local lodge shall appoint a
338 relief committee, of which he shall be chairman. The relief committee shall receive all moneys drawn for relief benefits and cause the same to be paid to the person for whom drawn within forty-eight (48) hours after receipt of same.

Cooperation of Lodges

SEC. 5. In the cities where more than one local lodge exists, delegates from all such local lodges should meet at least once a month for the purpose of considering matters affecting the welfare of the Association, and shall report the results of such meeting to their respective lodges. Every effort shall be made to secure a harmonious cooperation among the local lodges.

Emergency Funds

SEC. 6. Each local lodge shall set aside a percentage of its dues to be known as an "emergency fund," which fund may be used in case of emergency.

The funds of the local lodge shall not be divided by loan or any other method or to the members individually. Nor shall they be divided between any local lodges whatsoever, unless the approval of the International President and the Executive Council is first obtained.

Voluntary Donations

SEC. 7. No general appeal for financial aid shall be sent out by any local lodge to other local lodges unless the appeal has first been approved and countersigned by the International President. All moneys appropriated for financial aid by one local lodge to another local lodge must be sent to the General Secretary-Treasurer, who will acknowledge receipt of the same in the following monthly financial statement and forward the amount so paid to the local lodge for which appropriation was made.

339 ARTICLE F.

Membership

Eligibility

SECTION 1. Any machinist, automobile or aircraft machinist or mechanic, specialist, machinist helper, helper apprentice, production worker, or any apprentice working in the machine or metal industry may be admitted to membership in a local lodge of The International Association of Machinists upon assuming the obligation and paying the required fee.

Applications for Membership and Investigations

SEC. 2. Every application for membership in a local lodge shall be presented to such lodge in writing by some members thereof, and shall state the name, residence, date and place of birth, occupation, and place of employment of the applicant. If two-thirds (⅔) of those present consent thereto the local lodge may vote upon an application for membership at the same meeting at which the applicant is proposed; otherwise the application for membership shall be referred to a committee of three (3) members, two (2) of whom shall be appointed by the president and one of whom shall be appointed by the vice president. The committee shall investigate the eligibility of the applicant and report thereon at the next regular meeting of the local lodge, whereupon a yea and nay vote will be taken upon the question of the admission of the applicant to membership. A two-thirds (⅔) vote of those voting on the question shall be necessary to elect the applicant to membership. An applicant once rejected shall not again be voted on until after the expiration of six (6) months.

Nonresident Applicants

SEC. 3. Each applicant for membership in a local lodge shall be interrogated to ascertain the place from whence he came. If it appears that he is not a resident of the place wherein the

340 local lodge is located, the recording secretary shall communicate with the local lodge of the locality where the applicant was last employed for the purpose of ascertaining the applicant's standing in that community, and the application shall not be voted upon until after a report has been received from the local lodge communicated with.

Initiation Fees

SEC. 4. The minimum initiation fees for all local lodges shall be as follows: for journeymen machinists, automobile or air craft machinists or mechanics and specialists not less than five dollars ($5.00); for machinists' helpers and production workers not less than three dollars ($3.00); for apprentices not less than half the fee paid by journeymen machinists throughout the jurisdiction of The International Association of Machinists.

Forfeiture of Fees

SEC. 5. Any person elected to membership in a local lodge and who fails to appear for initiation within the period of four (4) weeks next following his election shall forfeit all right to be initiated and the fees theretofore paid by him unless a satisfactory reason for his failure to appear is duly received and accepted by the local lodge.

Universal Transfers

SEC. 6. Any member of a foreign metal trades union or any member of a trade union affiliated with the American Federation of Labor, who accepts employment under the jurisdiction of The International Association of Machinists, shall, upon application for membership and the presentation of his due book or other evidence of his good standing membership in such union and upon payment of three months dues in advance, shall be initiated into a local lodge of The International Association of Machinists and invested with full membership therein free of cost. All such due books or other evidence of good standing membership of such an applicant shall be forwarded to the General Secretary-Treasury, who shall issue a due book of this Association in exchange therefor. Any member of a local lodge who secures
341 employment within the jurisdiction of any other trade union affiliated with the American Federation of Labor and who is thereby required to become a member of such other trade union may retain his membership in a local lodge of The International Association of Machinists by paying such reduced rates of dues as may be stipulated by the local lodge of which he is a member. Such local lodge shall, however, pay full per capita tax to the Grand Lodge on all such members.

Obligation by Request

SEC. 7. A candidate elected in one local lodge may be initiated in another local lodge, but good and sufficient reasons must be given in writing to the local lodge in which the candidate was elected before said lodge can grant permission for his initiation in another lodge. The permission herein referred to shall be in writing, signed by the secretary and president and attested by the seal of the lodge by which he was elected, and addressed to the local lodge wherein he is to be initiated.

Local Lodge Dues

SEC. 8. The minimum monthly dues to be paid by members of all local lodges shall be as follows: machinists, automobile or aircraft machinists or mechanics, and specialists shall pay not less than one dollar and seventy-five cents ($1.75) per month dues, apprentices shall pay not less than one-half (½) rate, helpers and production workers not less than two-thirds (⅔) rate of dues paid by machinists.

Upon payment of dues each member shall receive a due stamp from the financial secretary as a receipt for each month's dues so paid, which stamp shall be affixed in the due book of the member and cancelled by the financial secretary as provided in Section 6 of Article D of this Constitution, and in no case shall the salaries of local lodge officers be paid by due stamps, but all such payments shall be made by cheque.

Misrepresentation

SEC. 9. Any member of a local lodge who falsely represents himself to be a competent workman shall be fined or
342 expelled at the discretion of the local lodge of which he is a member.

Commencement of Membership

SEC. 10. When a member is initiated or a person whose membership has been cancelled is reinstated to membership his initiation or reinstatement stamp shall be placed in his due book in the square for the month in which he is initiated or reinstated and his dues shall begin the month following. His good standing membership shall date from the date of his initiation or last reinstatement to membership, the date of which shall be recorded in his due book.

Due Books

SEC. 11. Every member of a local lodge of The International Association of Machinists shall have a due book, which shall bear a number designated by the Grand Lodge and shall be furnished

free of charge by the financial secretary of the lodge of which he is a member. The financial secretary shall purchase all due books from the General Secretary-Treasurer.

Machinists helpers shall be provided with a special due book with the words "Machinist Helper" printed thereon. All due books shall contain spaces for the affixing and cancellation of stamps, forms for the record of the payment of assessments and for noting transfers. Such due books shall contain a blank form for the description and identification of the owner, a blank for his signature, a designation of the branch of the trade in which he is most proficient, and a page containing a statement of Grand Lodge benefits.

The due book when properly stamped and bearing the seal of the local lodge shall serve all purposes for the identification of the owner and shall be received as evidence of his standing in The International Association of Machinists.

Lost Due Books

SEC. 12. Upon receiving a fee of twenty-five (25) cents and satisfactory proof that the due book of any member
343 has been lost, the financial secretary of the local lodge shall prepare an application for a new due book and forward the same, together with the fee of twenty-five (25) cents to the General Secretary-Treasurer, who, upon receipt thereof shall furnish a due book to replace the one so lost.

Transfers

SEC. 13. Any good standing member of a local lodge may transfer to any other local lodge. No accounting of arrearage dues shall be required between local lodges, but all district and local lodge assessments then due shall be collected and forwarded to the district or local lodge which levied the assessment. Should a due book be presented for the transfer of a member with one or more month's dues paid in advance, the owner of such book shall be entitled to transfer in regular form and the advanced dues shall remain the property of the lodge of which he was formerly a member. A member presenting his due book as prescribed herein shall at once become a member of the local lodge to which he transfers.

Visting Members

SEC. 14. A member of a local lodge upon visiting another local lodge shall be admitted upon passing a satisfactory examination.

Identification of Letters Illegal

SEC. 15. No letter or paper of identification other than the regular due book herein provided for shall be issued by any

financial secretary or other officer of a local lodge to any member of such lodge except for the purpose of showing the standing of such member on the books of the local lodge or in reply to an inquiry received from some other local lodge under the seal of such lodge.

Reinstatement

SEC. 16. Any person whose membership has been cancelled may be reinstated to membership, but the application for reinstatement,

be reinstated to membership, but the application for re-
344 instatement must be made to the lodge under whose jurisdiction the applicant is working and the regular reinstatement fee of such lodge must be paid.

If the application for reinstatement is filed in the local lodge wherein the applicant's original membership was canceled and the application is approved, said lodge shall immediately issue a reinstatement book containing a reinstatement stamp properly canceled, which transaction shall be entered on the monthly report of said local lodge in the same manner as initiations are entered.

If the application for reinstatement is filed in a local lodge other than that by which the applicant's membership was canceled, then the application, after having been approved by the local lodge receiving the same, shall be forwarded by the financial secretary of said lodge, together with a fee of two dollars ($2.00), to the General Secretary-Treasurer. Upon receipt of said application the General Secretary-Treasurer will issue a reinstatement book containing a reinstatement stamp properly canceled, and forward same to the financial secretary of the local lodge from which the application was received, and shall thereupon transfer the reinstated member to such lodge and notify the local lodge wherein the applicant's previous membership was canceled.

If the membership of the person applying for reinstatement was canceled for cause other than nonpayment of dues or if there are any unpaid fines, or local, district, or Grand Lodge assessments charged against him, his reinstatement shall not be effected, nor shall his due book be issued until said causes are removed and the fines and assessments are either remitted or paid in full. All applications for reinstatement shall take the usual course, except that it shall require a two-thirds (⅔) vote to reject an application for reinstatement. The foregoing provisions shall not apply to persons whose membership was canceled in lapsed, suspended, expelled or disbanded lodges. All such persons whose membership has been canceled shall be reinstated as provided in Section 2, Article J, of this constitution.

Dispensation

SEC. 17. The Executive Council shall have the authority to grant a special dispensation reducing initiation and rein-

345 statement fees for special cases where organizing activities are in progress or are contemplated, for such periods of time as may be determined by them.

Rejected Applications and Expulsions

SEC. 18. Each local lodge shall keep a correct list of all persons whose membership has been canceled and all applications that have been rejected, for future reference. Expelled persons and rejected applicants cannot again apply for membership until after the expiration of six (6) months from the date of said expulsion or rejection.

ARTICLE 6

Apprentices

SECTION 1. Any person engaging himself to learn the machinist trade shall serve an apprenticeship of four (4) years. Any person engaging himself to learn the automobile or aircraft machinists or mechanics trade shall also serve an apprenticeship of four (4) years. An apprentice shall not leave the employer to whom he has engaged himself without just cause and then only after securing the consent of the lodge of which he is a member. Any apprentice failing to comply with this provision shall stand suspended from any and all benefits of the Grand Lodge and local lodge until he returns to his employer. Failure to return to his employer within three (3) months shall be sufficient cause for his expulsion.

The ratio of apprentices shall be not more than one (1) apprentice for every ten (10) journeymen machinists employed. No person shall engage himself as an apprentice until he has reached the age of sixteen (16) year, and no person shall engage himself as an apprentice after he has reached the age of twenty-one (21) years; except that any person who has been a member of one (1) year's continuous good standing in a local lodge and has worked as a machinist helper for one (1) year in the shop where he desires to become an apprentice, may if he is not at that time past the age of thirty-five (35) years, engage himself to his employer as an apprentice. Such a person shall be known as a
346 "helper-apprentice" and shall serve four (4) years in learning the machinist trade, during which time he shall be governed by the rules and laws applicable to apprentices. The number of helper-apprentices shall at no time exceed the number of regular indentured apprentices in any shop.

Eligible to Membership

SEC. 2. Any apprentice at the trade is eligible to membership in a local lodge upon paying one-half (½) of the regular initiation

fee and one-half (½) of the regular dues charged against machinists in such lodge. He shall thereafter be entitled to benefits at the rate of one-half (½) of the benefits allowed machinists.

SEC. 3. Any machinist's helper who engages himself to an employer as an apprentice shall within five (5) days thereafter present his due book to the financial secretary of a local lodge having jurisdiction over the machinists in the shop wherein he is employed. The financial secretary shall immediately thereafter forward such due book to the General Secretary-Treasurer, who shall re-classify the member as an apprentice and forward to the financial secretary a proper due book in exchange.

Completion of Apprenticeship

SEC. 4. All apprentices upon the completion of their apprenticeship shall receive not less than the minimum rate of pay for machinists or automobile or aircraft machinists or mechanics in the locality where they are employed and shall thereafter pay full dues and assessments and be entitled to full benefits as members of their respective local lodges.

ARTICLE H

Duties of Members

Minimum Rate

SECTION 1. No member of any local lodge shall be allowed to start to work for wages less than the rate paid to his class.
347 Should any member vacate a position paying more than the minimum rate paid to his class, any other member who takes his place shall receive the same rate within thirty (30) days thereafter.

Going To Work in Other Localities

SEC. 2. Members of local lodges shall report to the financial secretary, business agent or shop committee before accepting employment within the jurisdiction of any other local lodge. Within five (5) days after commencing work in the new jurisdiction such members shall transfer to the local lodge having jurisdiction over the shop in which he is employed and shall have his transfer properly recorded in his due book.

Jurisdiction of Lodges

SEC. 3. In all cities where railroad, contract, automobile, and tool and die makers lodges exist, machinists must become members of the local lodge having jurisdiction over the class of work in which they are employed, provided that said local lodge has a contract or agreement with the employer covering the men claimed.

Declining Rough Work

SEC. 4. Any member of a local lodge who refuses to do any kind of work belonging to the trade because it is rough or dirty shall be subject to fine or expulsion.

Overtime

SEC. 5. Members of local lodges shall discourage the working of overtime.

Piecework, Two Machines and Premium Systems

SEC. 6. In shops where it is not now a practice no member of a local lodge is permitted to accept piecework, operate more than one machine, or accept employment under the premium, merit, task, or contract systems. Members found guilty of advo-
348 cating or encouraging any of these systems in shops where they are not now in operation shall be liable to expulsion.

Introduction of Unqualified Persons

SEC. 7. Any member of a local lodge who introduces into the trade any person other than a member of this Association, shall be heavily fined for the first offense and expelled for the second offense. This section shall not be construed to refer to apprentices properly indentured.

Inebriety

SEC. 8. Any person entering the local lodge room while under the influence of intoxicating drinks, or who is guilty of using indecent or profane language therein, shall be reprimanded, fined, suspended or expelled, at the option of the local lodge. Habitual drunkenness or conduct disgraceful to himself or associates shall be punished by expulsion.

Honorary Retiring Cards

SEC. 9. Any member of a local lodge who has been appointed a general foreman or a superintendent or who obtains employment outside of the trade or industry may either be transferred to affiliation directly with the Grand Lodge or may be furnished with a retiring card. No application for a retiring card shall be granted until all fines, dues and assessments charged against the applicant have been paid in full. Persons holding retiring cards shall not violate any of the laws or decisions of the Grand Lodge or any local or district lodge. Persons withdrawing their membership by accepting retiring cards shall not be entitled to any benefits, or permitted to attend meetings or participate in any of the business of the Association. All retiring cards shall be

furnished by the Grand Lodge, signed by the President and Financial Secretary, and bear the seal of the local lodge granting the same. Retiring cards shall not be issued to individuals who are actually working in the trade or industry and eligible to active membership in a local lodge, except to those members who have enlisted as machinists in the army, navy or marine
349 corps, and then only upon complying with the conditions herein set forth.

Deposit of Retiring Cards

SEC. 10. Any person holding a retiring card who again obtains employment within the trade or industry and thereby becomes eligible to active membership, shall, within five (5) days after obtaining such employment, deposit his retiring card with the local lodge having jurisdiction over the place where he is employed, which will be accepted in lieu of a reinstatement fee. The local lodge receiving the retiring card shall send the same to the General Secretary-Treasurer, who will issue a due book in exchange therefor as a reinstated member. Whenever any person holding a retiring card accepts employment and fails to deposit the same as herein provided for, the president of any local lodge shall cancel such retiring card and immediately notify the General Secretary-Treasurer of his action.

Whenever a retiring card is deposited in a local lodge a membership application form, properly filled out, shall be filed for the purpose of record.

ARTICLE I

Assessments

How Levied

SECTION 1. In case of emergency local lodges may levy assessments on all members under their jurisdiction. No special assessment can be levied until the same has been approved by a two-thirds (⅔) vote of the members of the local lodge attending a summoned meeting, notice of which has been served in writing on each member, by mail or otherwise, at least seven (7) days before the date of the meeting. Every member present at such meeting shall vote unless excused by the president, and those not voting shall be recorded as voting in favor of the assessment.

SEC. 2. All assessments and fines shall be due within thirty (30) days after levied. If not paid within that time the fi-
350 nancial secretary shall notify those in arrears in writing, and should they fail to make payment, within sixty (60) days from the date of such written notice, their membership shall be cancelled regardless of the date to which their dues are paid.

ARTICLE J

Individual Affiliations With the Grand Lodge

SECTION 1. In localities where there is not a sufficient number of machinists, automobile or aircraft machinists or mechanics, specialists, helpers, apprentices, and production workers employed to organize a local lodge, the Grand Lodge shall issue due books affiliating those eligible to membership directly with the Grand Lodge, as provided for in Section 1, Article XX, of the Grand Lodge Constitution. Such members may transfer to the nearest local lodge in accordance with the provisions of Section 2, Article H, of the constitution of local lodges. The local lodge receiving such a member shall notify the General Secretary-Treasurer who shall record the transfer.

Grand Lodge Reinstatements

SEC. 2. All persons whose membership was cancelled in lapsed, expelled, suspended, or disbanded local lodges working in a locality where a local lodge exists may be reinstated by the Grand Lodge upon making application therefor and paying the reinstatement fee charged by the nearest local lodge, which fee shall not be less than five dollars ($5.00). The local lodge shall forward the application for reinstatement together with the Grand Lodge reinstatement fee of $2.00, and the balance of the reinstatement fee, if any, shall belong to the local lodge.

ARTICLE K

Code

SECTION 1. It is the duty of any member who has information of the violation of any provisions of the Constitution of the Grand Lodge or the constitution of local lodges, by any member
351 or members, to immediately prefer charges in writing against such member or members by filing same with the president of the local lodge to which the accused member or members belong, who shall supply a copy of the same to the member against whom the charges are preferred and turn over the original charges to the committee provided for by the following section:

SEC. 2. Whenever charges have been preferred against a member of a local lodge the president of such lodge shall immediately appoint a committee to investigate the charges, take testimony, and decide upon the guilt or innocense of the one accused. The committee so appointed shall within one week thereafter notify the member against whom the charges have been preferred as to the time and place, when and where, to appear for trial.

SEC. 3. The accused shall have the privilege, either in person or by attorney (the attorney being a member of a local lodge) to cross-examine all witnesses appearing for the prosecution and present all such evidence as he may deem proper in his own behalf. The committee shall consider all of the evidence in the case and thereafter agree upon its verdict of guilty or not guilty. If the verdict be that of guilty the committee shall then consider and agree upon its recommendations of punishment.

SEC. 4. If a member of a local lodge fails to appear for trial when notified so to do, the trial shall proceed as though he were in fact present.

SEC. 5. The trial committee shall report its findings at the next regular meeting of the local lodge. The report of the trial committee shall contain a synopsis of the evidence introduced at the trial together with its verdict. If the verdict is "guilty" the report shall set forth the recommendation of the committee as to the punishment to be imposed.

SEC. 6. Upon receiving the report of the trial committee and after due consideration thereof, the question of the guilt or innocence of the defendant shall be submitted to a vote by secret ballot of the local lodge. If a majority of those voting on the question vote in favor of a verdict of "guilty" then the question of accepting or rejecting the recommendation of the trial committee as to the punishment of the defendant shall be submitted to a vote by secret ballot of the members of the local lodge in attendance. The recommendation of the committee may be
352 amended, rejected, or another punishment substituted, therefor by a majority vote of those voting on the question, except that it shall require a two-third (⅔) vote of those voting to expel the defendant from membership.

Limit of Fines

SEC. 7. No fine shall be imposed upon any member or applicant eligible to membership in this Association in excess of fifty dollars ($50.00) unless the same is first approved by the Executive Council.

Appeals

SEC. 8. Appeals may be taken from the decision of any local lodge or Grand Lodge Officer to the International President, and thereafter appeals may be prosecuted in accordance with the provisions of Section 6, of Article XXI of the Grand Lodge Constitution.

Rights of Members and Lodges During Appeal

SEC. 9. While any member or local lodge is exercising the right of appeal the financial standing of such member or local lodge shall not be impaired by refusal to accept dues or per capita tax

until after the Executive Council has passed upon the appeal. Should any member or local lodge decide to appeal from the decision of the Executive Council they must comply with the provisions of Section 6 of Article XXI of the Grand Lodge Constitution. No individual member or local lodge shall appeal to the civil courts for redress until after having exhausted all rights of appeal under the provisions of this Constitution and the Constitution of the Grand Lodge.

GEO. H. PEDERSEN, *Chairman*,
GEO. E. WRIGHT, *Secretary*,
F. L. BARTLETT,
B. L. RINEHART,
JOHN GROSS,
Committee on Law, 1941.
H. W. BROWN,
International President

Attest:
E. C. DAVISON,
General Secretary-Treasurer.

353

INDEX

A

	Page
Aircraft Mechanic	
Definition of	60
Appeals	
From a decision of the International President to Executive Council	51
From the Executive Council to a convention or referendum	51
May be prosecuted in accordance with Section 6, Article XXI	89
May be taken to the International President	89
Rights of members and lodges during appeals	89
Apprentices	
Age of	82
Completion of apprenticeship	82
Eligible to membership	83
Helper apprentices	82
Ratio of apprentices	82
Term of apprenticeship	82
Assessments	
District Lodge	40
Grand Lodge	28
How levied	28
Local lodge	
Due after 30 days	86
How levied	86
Requires two-thirds vote	86
Seven days notice must be given	86

	Page
Assistant Secretary	
Bond of	19
Duties of	19
To be appointed by the G. S. T	19
Auditing Committee	
Audit of Grand Lodge books to be held in January and July	22
Auditors to employ a public accountant	22
Election of within a radius of 40 miles of headquarters	21
Report to be published and verified under oath	22
Auditors, Grand Lodge	
Duties of	20
Appointment of	17
Automobile mechanic	
Definition of	60
B	
Ballots	
Grand Lodge election	4
Invalidated by failure to vote for required number of candidates	4
Preparation and description of	4
Second in case of tie vote	9
Supplied to all lodges by the G. S. T. without cost	4
Beneficiary Department	53, 54, 55
354 Benefits	
When entitled to	28
Death	30
Absence of relatives	33
Age limit	31
Amount of, based on length of membership	30
For apprentices	31
For helpers	31
For members initiated or reinstated after April 1, 1937	31
For production workers	31
How claimed	30
Proof of death	30
To whom paid	32
Sick	33
Strike Donations	28
Arrearages may be deducted from donations	29
Donations may be denied at the discretion of the President and Council	29
Lockout donations	28
Members must receipt for same	30
Method of payment of donations	29
Qualifications to receive donations	29
Victimization donations	28

Bonding Department
Page
All district and local lodge financial officers must be bonded 42
Bonds to run for year 42
Established by Executive Council 42
Report semi-annually by G. S. T. 42
Business agents
Control of 41
Location of activities 42
Qualifications for 41
Reports of 41
Where established 40

C

Candidates in Grand Lodge elections
Acceptance or rejection of nomination 4
Certification of by local lodges 4
Endorsement of 3
Filing of endorsements 3
For Committee on Law 2
For Delegates to the A. F. of L. 2
For Delegates to the T. & L Congress 2
For office in the Grand Lodge 2
Notification of by G. S. T. 2
Number of 4
Qualification of 3
Charters 2
Application for 62
Applications from persons whose membership has been cancelled 64
355 Fees for 62
Granting of 63
Restrictions on 63
Who may obtain 63
Code
Fines limited to $50 89
Guilt or innocence decided by secret ballot 88
Members must prefer charges for violation of Constitution 87
Trial Committee shall hear charges 88
Trial Committee shall report its findings and recommend penalty 88
Committees
Filing and publication of endorsements 3
Number of nominees 4
All Convention Committees, not otherwise provided for, may be appointed by the President and Executive Council 27

Committees—Continued Page
Convention Committee on Rules to be appointed by President 27
Credential, to be composed of the Executive Committee 26
To meet four days before the convention 26
To report its findings upon the eligibility of delegates and the financial standing of local lodges 25
Law, meeting and report of 52
Compiling of Constitution 52
Elected at same time 2
Nomination of 3
Qualifications of 2
Submission of amendments to the membership 52
Resolution, to be appointed by the International President from qualified delegates 26
Committee to meet before convention 26
Committee to report to convention as soon as possible 27
Constitution, revision of
Amendments, re-submission of 47
Amendments to be compiled and printed by G. S. T. and mailed to local lodges 51
Amendments to be sent to G. S. T. 45 days before convention 51
Local lodges to appoint committees to consider amendments 51
Publication of votes and amendments 46
Conventions
Convention city selected by Executive Committee 23
Emergency conventions, how called 23
Method of calling 23
Representation and vote of local lodges 23
Three local lodges in radius of 150 miles, having less than 100 members each, may combine to send delegates 24

D

Declaration of election
Nominees with the highest vote shall be declared elected by the tellers 8
Definitions
Apprentice, an 61
Automobile and Aircraft Machinist or Mechanics 60
356 Helper, a 61
Local lodge, a 60
Machinist, a 60
Production worker, a 61
Specialist, a 60

	Page
Delegates	
Filing and publication of endorsements	3
Nomination of	3
Number of nominees	4
Qualification of	2
To A. F. of L. and T. & L. C. of Canada elected at same time	2
To A. F. of L., nomination of	3
To Trades & Labor Congress of Canada	3
Dispensations	
Authority of Executive Council to grant lower initiation and reinstatement fees	81
District lodges	
Appointment of tellers	67
Assessments of	40
Authority of	39
Elections by referendum	67
Jurisdiction of defined by Executive Council	39
Jurisdiction over local lodges	39
Representation and revenue	39
Where established	38
Due books	
Cost of	18
Description of	18
Furnished free of charge	79
Lost	79
Shall bear a number	79
Shall be sole identification	79
To be furnished by the G. S. T.	18
Dues	
Due stamps	78
For Grand Lodge affiliation	18
Local lodges	78
Duties of members	
Introduction of unqualified persons	85
Declining rough or dirty work	84
Going to work in other localities	84
Inebriety	85
Minimum rates	83
Must transfer membership	84
Overtime	84
Piecework, etc	84
E	
Editor	
Duties of	21
To have management and supervision of Journal	20

357 Election of delegates — Page
Grand Lodge officers not eligible to serve as delegates — 26
Local lodges must report result of election to the G. S. T — 24
New lodges organized not later than June in convention year may elect delegates — 24
Qualifications of delegates — 25
The G. S. T. shall rearrange the dates when special conventions are called — 25
The G. S. T. shall send list of elected delegates to all local lodges — 24
To I. A. of M. conventions to be held in June — 24
Elections, Grand Lodge
Ballots by mail to members out of town — 5
Due books must be presented and marked — 6
Illegal voting punishable by expulsion — 6
Inspectors of election to be elected by local lodges — 6
Lodges may convene at 8 a. m. — 6
Notification of absent members — 5
Place of voting — 5
Qualifications to vote — 5
The G. S. T. must forward ballots to members affiliated with Grand Lodge — 6
Time and method of voting — 6
Time of voting — 5
Voters must sign the ballot — 6
Executive Council
Membership of — 14
Powers of — 14
Reports of — 16
Exemption cards
Qualifications for — 32
Expenses
Delegates to the A. F. of L. of — 43
Delegates to the Trades & Labor Congress of Canada of — 43
Grand Lodge, auditors of — 43
Grand Lodge, officers of — 43
Grand Lodge Representatives of — 43
Law committee of — 43
Of delegates to conventions — 26
Of Resolution Committee — 27

F

Fines
Limit of — 89
G. S. T — 46

G

	Page
General Secretary-Treasurer	
Duties of	16
Receipt of funds	16
Shall be fined for neglect of duty	46
Shall collect per capita tax from local lodges	18
Shall deposit all funds in approved bank	17
Shall issue monthly financial report and review statement to all local lodges	17
Shall keep book account with each local lodge	17
Shall place all income from investments in emergency fund	17
358 Grand Lodge	
Authority to determine customs and usages	1
Funds, deposit of	17
Investment of	14
Government between conventions invested in	1
Membership and jurisdiction of	1
Name and location of	1
Officers, how chosen	2
Officers of	2
Officers, qualifications of	2
Power to grant charters	1
Supervision over local and district lodges	1
Grand Lodge Officers	
Filing and publication of endorsements	3
Nomination of	3
Number of nominees	4
Grand Lodge Representatives	
Qualifications of	22

H

Helper	
Definition of	60
Hold no other office	
Grand Lodge Officers, District lodge officers, Local lodge officers, who are fully employed by the association, shall hold no other office	43

I

Identification letters	
No letters or other papers of identification shall be issued	80
Improper conduct	
Charges against members in writing	50
Definition of	49
Encouraging secession	49
Failure to bring to trial or punish	50
Members expelled for	49
Trial under Code	50

	Page
Individual affiliation, Grand Lodge	
Granted where not enough members to form a lodge	87
Individual affiliations	
Conditions of	48
Direct with Grand Lodge	48
Fees and dues	48
Initiation and reinstatement fees to Grand Lodge	
For apprentices	18
For helpers	18
For journeymen	18
For production workers	18
For specialists	18
On Grand Lodge affiliations	18
Initiation fees	
Fees, forfeiture of	77
Local lodge	77
359 Installation	
Grand Lodge Officers	9
International President	
Appoint Grand Lodge Representatives and assign their duties	11
Duties of	11
Provide literature	11
Shall appoint all temporary officers and committees	12
Shall assign the Vice Presidents to specific territories	12
Shall be Chief Organizer	11
Shall countersign all financial orders	12
Shall decide all constitutional questions	11
Shall have supervision of local and district lodges	12
Shall have tie vote	11
Investment of funds	
Executive Council to have full control of funds	14
May invest same	14
May negotiate loans	14
May sell securities	14
May withdraw same	14
Funds of the Grand Lodge may only be invested in trustee securities	15

L

Local Lodge Constitution	
Bylaws	49
How amended	49
To be approved by Grand Lodge	49
Local Lodges	
Bylaws of	64
Control over property by Grand Lodge	66
Fines	89
Meetings and quorums	64

Local Lodges—Continued
Page
Merged lodges, funds of 66
Order of business 65
Organization of 61
Parliamentary laws 64
Seal, illegal use of 66
Seal of 65
Local Lodges, duties of
Cooperation of lodges 75
Discussion of economics 74
Donations, voluntary 75
Emergency funds 75
Legislative committee 74
Minimum wage scale to be established 74
Relief committee 74

M

Machinist
Definition of 60
Membership
Applicants nonresident 76
Applications for 76
Members, duties of 84–85
Commencement of 79
Eligibility 76
Membership cancelled
For delinquency 33
Good standing dates from last reinstatement 33
Misrepresentation
As to ability or competence 78
Monthly journal
Contents of 21
Finances of 20
Publication of 20
Subscription to 20

O

Officers, Local Lodges
Election of 68
Election of by referendum 67
Installation of 68
Number and titles of officers 66
Qualifications of 67
Terms of 67
Officers, Local Lodges, duties of
Auditors 73
Conductor 72
Financial secretary 69
Past-president and statistician 72

Page

Officers, Local Lodges, duties of—Continued
President ---- 68
Recording Secretary ---- 69
Sentinel ---- 72
Treasurer ---- 72
Trustees ---- 73
Vice president ---- 69
Overtime
Shall be discouraged ---- 84

P

Parliamentary laws
Roberts' Rules of Order, except as otherwise provided in the Constitution, shall govern procedure at conventions ---- 27
Pension plan
For Grand Lodge officers and employees ---- 55
Per capita tax
Changes in ---- 47
District ---- 72
For apprentices ---- 18
For helpers and production workers ---- 18
For journeymen and specialists ---- 18
To be collected by G. S. T. ---- 18
Piecework
Discouraged ---- 84
Production worker
Definition of ---- 61

R

Recall provisions
Duties of the G. S. T. in connection therewith ---- 10
Local lodges may institute recall of any Grand Lodge Officer ---- 9
361 Number of endorsements required ---- 10
Officer whose recall is sought shall, if qualified, have his name on the ballot ---- 10
Petition for recall must contain specific charges ---- 10
Referendum
Definition of ---- 44
Fines for neglect ---- 46
Form of amendments ---- 45
How invoked ---- 44
Law Committee, special meeting of ---- 47
Method of voting and returns ---- 46
Publication of amendments ---- 45
Publication of votes and amendments ---- 46
Re-submission ---- 47
When in effect ---- 47

Page

Reinstatements
All fines and assessments to be paid in full ---- 81
Applications for ---- 80
By Grand Lodge ---- 87
Conditions of reinstatement ---- 87
Dispensations by Executive Council ---- 81
Fees for reinstatement ---- 87
Fees to Grand Lodge ---- 81
Stamps ---- 81
Who may be reinstated ---- 87
Representation at count
Candidates for the Presidency may select two tellers ---- 7
The tellers shall employ a public accountant ---- 8
The tellers shall have full charge of the count and shall render a full report of the vote of each lodge ---- 8
Retiring cards
All fines and assessments must be paid ---- 85
Deposit of ---- 86
Furnished by Grand Lodge ---- 85
Qualification for ---- 85
Revenues of the Grand Lodge
How derived ---- 27

8

Salary
Changes in ---- 47
Of Assistant Secretary ---- 19
Of Auditing Committee ---- 22
Or Grand Lodge Auditors ---- 20
Of Grand Lodge Representatives ---- 22
Of International President ---- 13
Of Law Committee ---- 53
Of the Editor of the Journal ---- 21
Of the General Secretary-Treasurer ---- 19
Of Resolutions Committee ---- 27
Of Vice Presidents ---- 16
Strikes
Authorization of ---- 35
Decide by secret ballot ---- 36
Declaring off ---- 37
Discontinuance of grievance ---- 37
Financing ---- 38
Handling unfair work ---- 38
Method of declaring ---- 36
Sanction must be obtained ---- 36
Statement of grievance to be sent Grand Lodge ---- 37
Strike stamps ---- 35
Submitted to Executive Council ---- 36
Donations for ---- 28

T

	Page
Tabulations of votes	
Inspectors of election must tabulate the vote	7
Perforated register slips must be retained for ninety days and surrendered to Grand Lodge Tellers is required	7
Tally sheet and ballots must be sent to the G. S. T. in special containers	7
Tellers Grand Lodge election	
Duties of	8
Report of	8
Salary and expenses of	8
Transfers	71–80
Assessments due must be collected	80
Members may transfer to any other lodge	80
Obligation by request	78
Universal	77

U

Unemployment stamps	
Conditions of issue	34
Cost of	18
Must register name weekly	34
Qualification for	34
Unfair work	
Handling of	38

V

Vacancies in Grand Lodge offices	
How filled	9
Vice Presidents	
Duties of	15
Salaries of	16
Shall file report and expense account with the President weekly	16
Visiting Members	80

363 Amendments Voted January, 1942, Effective April 1, 1942

Salary of International President

Amend Section 8, Article III, line 27, by canceling the figures "$7,500" and inserting the figures, "$8,540".

Salary of General Vice Presidents

Amend Section 6 of Article IV, line 7, by canceling the figures, "$4,500" and inserting the figures, "$5,540"; also by inserting after line 7, the following:

"The General Vice President assigned to Grand Lodge Headquarters shall receive a salary of $6,580, payable in fifty-two (52) equal weekly installments."

Salary of General Secretary-Treasurer

Amend Section 8, Article V, line 18, by canceling the figures, "$6,500" and inserting the figures, "$7,540".

Salary of Assistant General Secretary-Treasurer

Amend Section 9, Article V, line 26, by canceling the figures, "$3,600" and inserting the figures, "$4,380".

Salary of Grand Lodge Auditors

Amend Section 11, Article V, line 3, by canceling the figures, "$3,600" and inserting the figures, "$4,120".

Salary of Editor of Machinists' Monthly Journal

Amend Section 5, Article VI, line 24, by canceling the figures, "$4,500" and inserting the figures, "$5,540".

Salary of Grand Lodge Representatives

Amend Section 1, Article VIII, line 31, by canceling the figures, "$3,600" and inserting the figures, "$4,120".

364 UNION LABEL OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS

All articles upon which this label appears are manufactured by members of the International Association of Machinists.

365 AFFILIATIONS

American Federation of Labor.
Canadian Trades and Labor Congress.
Railway Employes Department of American Federation of Labor.

Metal Trades Department of American Federation of Labor.
Label Trades Department of American Federation of Labor.
Railway Labor Executives Association.

367 *Petitioners' Exhibit 2*

INTERNATIONAL ASSOCIATION OF MACHINISTS LOCAL LODGE NO. 1683 CHARTER

To whom it may concern: Whereas a petition has been received from

Charles Alsman
Chris O. Beider
Ernest Brunson
Earl Chew
Clark Corya
J. Chas. Cutrell
Earl Dugan
Ernest Elliott
Samuel R. Flynn
Otis L. Forbes
Richard French
Leland Haines
Homer Hill
George Logeman
Harry Ludlum
Paul E. Miller
Lawrence Myers
Wm. Patrick O'Day
Fred F. Perkins
Mendes C. Peters
Ralph Ratliff
A. M. Smith
Paul F. Steiner
Michael Temple
Harvey Terrell
Frank Wilson
C. A. Bartlett
Wm. L. Blackmore
Boner Caldwell
Roy Conrad
Carta Crismore
Earl L. Davis
Earl Eggleton
Edward Farrell
Carl Fohl
Earl L. Ford
Henry Haehl
Carl Haskell
Harry S. Hutson, Sr.
Orville Lucas
Noah Lyons
Harry M. Minner
Ira O. McClain
Geo. R. Owens
Elmer Perry
Harry Ralston
Clifford Scholl
Vane Southwood
Ernest Stigall
Ollie Tennell
Glen B. Vore

praying to be chartered as a subordinate lodge under the name of Plant Protection Lodge No. 1683, to be located at Indianapolis, State of Indiana.

Know ye that acting under the authority vested in us by the Grand Lodge of the Order of the International Association of Machinists, we do hereby grant this charter to be issued to the Petitioners named and their associates and successors under the title above named; to bear date March 29, 1943, and by virtue of this instrument the said Lodge is hereby authorized to act and enjoy all the privileges of the Laws of the Order.

The Grand Lodge reserves the right to suspend and reclaim this Warrant and Charter, and to annul the rights and privileges herein conferred for any neglect or refusal to conform to the Laws and Usages of this Order.

In witness whereof, we hereunto affix our names and Seal this 2nd day of April, 1943.

[SEAL]

(S) H. W. BROWN,
International President.
(S) E. C. DAVISON,
Gen. Sec.-Treas.

369 Before the National Labor Relations Board

Ninth Region

Case No. 9–C–1982

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90, AND THEIR AFFILIATE LOCAL 1683, AFFILIATED WITH AMERICAN FEDERATION OF LABOR

ROOM NUMBER 216, FEDERAL BUILDING,
INDIANAPOLIS, INDIANA,
Monday, January 31, 1944.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock a. m., c. w. t.

Before CHARLES E. PERSONS, Trial Examiner.

Appearances: Messrs. Thomas E. Shroyer and Allen Sinsheimer, Jr., for the National Labor Relations Board, 443 U. S. P. O. and Court House, Cincinnati, Ohio; Messrs. Kurt F. Pantzer and Lewis D. Spencer, 1313 Merchants Bank Building, Indianapolis, Indiana, appearing on behalf of the Respondent; Messrs. E. M. Richardson, Business Agent, Carl Cedarquist, Grand Lodge Representative, William J. Layton, Business Agent, 491½
370 South Delaware Street, Indianapolis, Indiana; and Mr. Van B. Carter, Business Agent, International Association of Machinists, Broadway Hotel, Cincinnati, Ohio; all appearing on behalf of the International Association of Machinists, District Number 90, and their affiliate Local Lodge 1683.

372

PROCEEDINGS

Trial Examiner PERSONS. This is a formal hearing before the National Labor Relations Board in the matter of E. C. Atkins and Company and International Association of Machinists, District 50, and their affiliate Local 1683, also affiliated with the American Federation of Labor. The case is known in the Board's system of numbering as Number 9–C–1982.

The name of the Trial Examiner appearing for the National Labor Relations Board is Charles E. Persons, of Washington, D. C.

Counsel will please state all appearances for the record.

For the Board?

Mr. SINSHEIMER. Allen Sinsheimer, Junior, and Thomas E. Shroyer.

Trial Examiner PERSONS. For the Respondent?

Mr. PANTZER. Kurt F. Pantzer, and Lewis D. Spencer for the Respondent, E. C. Atkins and Company.

Trial Examiner PERSONS. You might just give your address in the record also, please.

Mr. PANTZER. 1313 Merchants Bank Building, Indianapolis 4, Indiana.

Trial Examiner PERSONS. For the Machinists?

Mr. CARTER. Van B. Carter, Broadway Hotel, Cincinnati,
373 Ohio.

Mr. RICHARDSON. F. M. Richardson, 491½ South Delaware Street, Indianapolis 4, Indiana.

Mr. CEDARQUIST. Carl Cedarquist, Grand Lodge Representative, 491½ South Delaware Street, Indianapolis 4, Indiana.

Mr. LAYTON. William J. Layton, Business Agent, Machinists, 491½ South Delaware Street, Indianapolis 4, Indiana.

Trial Examiner PERSONS. I take it, Mr. Hise, that you have all the official titles?

(The reporter replied in the affirmative.)

Mr. CEDARQUIST. Mr. Trial Examiner, may I make a correction there—that is, District 90 instead of District 50.

Mr. PANTZER. What is the correction?

Trial Examiner PERSONS. I gave "District 50" instead of "District 90" purely as my own mistake. The correct number is District 90 and it is so stated on the complaint and this is purely a verbal error on the part of the Trial Examiner, and this explanation is to correct the matter in the record.

I have certain announcements which I am sure you all have heard. Will it be sufficient for the record if these things appear in the record without my actually reading the statement,
374 or would you prefer that I read it into the record?

Mr. PANTZER. I have no desire to take the Examiner's time. I am familiar with the statement.

Trial Examiner PERSONS. I am sure all the representatives are and if there will be no objection, that statement will be entered into the record by reference at this point and Mr. Hise will take care of that matter herein.

The official reporter makes the only official transcript of these proceedings. Citations in briefs or arguments based upon the record, directed to the Trial Examiner or to the Board, must cite the official transcript in all references to the record. The Board will not certify any transcript other than the official transcript for use in any court litigation.

It may become necessary to make corrections in the record during the hearing. If so, the party desiring the correction will submit the suggested correction to the other party or parties in writing. When this has received their written approval, it will be submitted to the Trial Examiner.

In the event the parties are unable to agree upon proposed corrections, the Trial Examiner will then consider motions to correct the record or may, upon his motion, order certain corrections made.

If the parties have been unable to agree upon such
475 corrections before the close of the hearing, but have entered into a stipulation concerning such matters after the close of the hearing, but before the transfer of the case to the Board, such stipulations or motions should be addressed to the Trial Examiner in care of the Chief Trial Examiner in Washington. After the transfer of the case to the Board, all such communications should be directed to the Board itself, inasmuch as by such transfer to the Board the Trial Examiner's connection with the case ceases.

Since this is a formal hearing, we shall maintain the dignity and decorum which usually accompany judicial proceedings.

Concise statements of reasons for motions or objections will be permitted, but the Trial Examiner may go "off the record" for the purpose of hearing extended argument. Off-the-record discussion or argument will not be included in the official transcript unless an order to that effect be made by the Trial Examiner, either upon the request of any of the parties or upon his own motion. All requests to go off the record are to be directed to the Trial Examiner and not to the official reporter.

The Trial Examiner will allow an automatic exception to all adverse rulings, and upon appropriate order an objection and exception will be permitted to stand to an entire line of questioning.

476 Five copies of all pleadings submitted during the hearing are to be filed with the Trial Examiner.

All exhibits offered in evidence shall be in duplicate.

At the close of the hearing the parties may, if they so request, argue orally before the Trial Examiner, or at such time, if the Trial Examiner believes that oral argument would be beneficial to his understanding of the contentions of the parties and the factual issues involved, will request oral argument from the parties, and will feel free to discuss with and ask questions of the counsel or representatives of the parties with respect to their contentions as to the issues, the facts, and the legal principles involved.

Any party shall be entitled, upon request made before the close of the hearing, to file a brief with the Trial Examiner, who, before closing the hearing, will then indicate the time in which, from the close of the hearing, such briefs may be filed.

Five copies of such briefs shall be directed to the Trial Examiner in care of the Chief Trial Examiner, in Washington.

Mr. Sinsheimer, you may now put in the formal papers.

Mr. SINSHEIMER. I now offer for identification, as Board's Exhibit 101–A, the Complaint issued on January 12, 1944, by Rosemary S. Macke, Acting Regional Director, Ninth Region,
377 together with the attached Notice of Hearing dated January 12, 1944, signed by Rosemary S. Macke, Acting Regional Director, together with a copy of the charge filed by the International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, dated on the 22d of December 1943:

(Thereupon the document above referred to was marked "Board's Exhibit No. 101–A" for identification.)

Mr. SINSHEIMER. I now offer for identification, as Board's Exhibit Number 101–B, Affidavit as to Service of a Complaint and Notice of Hearing, and a copy of the charge on E. C. Atkins and Company and the International Association of Machinists, District 90, and their affiliate Local 1683, signed by Bertie Workman, on January 13, 1944, together with attached return receipts showing service thereof.

(Thereupon the document above referred to was marked "Board's Exhibit No. 101–B" for identification.)

Mr. SINSHEIMER. I now offer for identification, as Board's Exhibit 101–C, Order Granting Motion, of Respondent for extension of time to January 29, 1944, for the purpose of filing its answer.

(Thereupon the document above referred to was marked "Board's Exhibit No. 101–C" for identification.)

378 Mr. SINSHEIMER. I now offer for identification, as Board's Exhibit Number 101–D, Affidavit as to Service of Order Granting Motion, together with attached return receipts showing the service thereof.

(Thereupon the document above referred to was marked "Board's Exhibit No. 101–D" for identification.)

Mr. SINSHEIMER. I now offer for identification, as Board's Exhibit Number 101–E, Answer of Respondent, E. C. Atkins and Company, received on January 28, 1944——

Mr. PANTZER. Mr. Sinsheimer, may we have a statement for the record that that answer was received within the time for which the filing date was extended?

Mr. SINSHEIMER. Yes; I will agree to that.

Mr. PANTZER. Thank you.

(Thereupon the document above referred to was marked "Board's Exhibit No. 101–E" for identification.)

Mr. SINSHEIMER. Do the parties wish to examine any of these?

Mr. PANTZER. Yes; if you please.

(Documents handed to Mr. Pantzer.)

Mr. PANTZER. No objection.

Mr. SINSHEIMER. I now offer Board's Exhibits 101-A, 101-B, 101-C, 101-D, and 101-E in evidence.

379 Trial Examiner PERSONS. There being no objection, the documents will be received and placed in evidence as a part of this record, as Board's Exhibits Numbers 101-A through 101-E, inclusive.

(The documents heretofore marked "Board's Exhibits Nos. 101-A through 101-E" inclusive, for identification, were received in evidence.)

Mr. SINSHEIMER. At this time I will ask the Examiner if we might go off the record?

Trial Examiner PERSONS. Can you tell us how long it will be?

Mr. SINSHEIMER. Well, I don't know, but I would like to discuss a few matters with counsel.

Trial Examiner PERSONS. All right, off the record. (Discussion had off the record.)

Trial Examiner PERSONS. On the record, please.

Mr. PANTZER. May I be permitted to interrupt Mr. Sinsheimer in order to present to the Trial Examiner the original copy of an application for subpoena duces tecum directed at Mr. S. M. Richardson, to produce certain union records, a copy of which I have left with Mr. Sinsheimer, and another copy of which I have left with the representatives of the union over here (indicating) at the Union table.

Is your Honor prepared to rule upon the application for subpoena duces tecum at this time?

389 Trial Examiner PERSONS. Upon first examination, Mr. Pantzer, it appears to me that this subpoena duces tecum is aimed at things which naturally come up in "R" proceedings. Now, I understand we have already had the "R" proceedings in this particular case—am I correct in that?

Mr. PANTZER. Yes; we have had the "R" proceedings.

Mr. SINSHEIMER. I would like it to be noted in the record that the Board is objecting to all matters called for in the subpoena duces tecum expecting the Charter and By-laws of the Union and as to those I do not know whether Mr. Pantzer wants those produced or not.

Mr. PANTZER. Well, if the Charter, Constitution and By-laws, as produced at the representation case, may be considered as being in evidence in this case, which I take it will be so stated in the stipulation which Mr. Sinsheimer and I are about to enter, in this case, then there is no need to have a subpoena duces tecum directed at further production of those particular documents and I hereby withdraw, for the purposes of this record, Item Number 1 of the application just handed to the Trial Examiner entitled "Charter, Constitution and By-laws of the Union."

Mr. SINSHEIMER. We will agree that they will be introduced, or agree that they are in this hearing.

Trial Examiner PERSONS. Were they made a part of the record of the previous proceedings?

381 Mr. SINSHEIMER. That is correct.

Trial Examiner PERSONS. Well, in the event these proceedings should find their way into the Circuit Court, they would become, by the language of the Act itself, a part of the record there.

Mr. PANTZER. That is right.

Mr. SINSHEIMER. As to the other matters called for in the subpoena duces tecum, the Board is objecting to?

Mr. PANTZER. May I, Mr. Examiner, have the application marked Respondent's Exhibit Number 1 for the purpose of identification—I am wondering, in order to avoid confusion with the record in the previous case, whether or not we might be permitted to number our exhibits in this case alphabetically, because I do anticipate this case will go to the Circuit Court and it will avoid a great deal of confusion in the matter of like-numbered exhibits?

Trial Examiner PERSONS. May I ask if a similar request was presented in the "R" proceeding?

Mr. PANTZER. Yes; a similar request was made in the "R" proceeding—the chief difference between the "R" proceedings and this proceeding being the inclusion of the collective bargaining agreements and copies of the grievances and seniority lists referred to in the request and the inclusion of the request and the inclusion of Paragraph F of the reasons for the requests in the pres-

382 ent document, those items not having appearing in the application which was submitted in the representation case.

Trial Examiner PERSONS. The request of the respondent as to the numbering of those exhibits will be at this time denied. I think it might well be a part of the record, but we cannot interfere with the official reporter's instructions as to how these exhibits shall be numbered. That is covered, is it not, Mr. Hise, by your instructions?

The REPORTER. Yes; your Honor.

Trial Examiner PERSONS. It is stipulated between the parties to avoid confusion between the numbering of exhibits in this "C" proceedings and those exhibits previously numbered in the "R" proceeding—that the numbering of the exhibits in the case of both these respondents and the Board, will start with number 100——

Mr. PANTZER. With 101, if you please, sir.

Trial Examiner PERSONS. Yes; number 101—do you so agree?

Mr. SINSHEIMER. We agree to that.

Mr. PANTZER. And we do too. Thank you, your Honor.

(Thereupon, the document above referred to was marked "Respondent's Exhibit No. 101" for identification and received in evidence.)

Trial Examiner PERSONS. And the Machinists?

Mr. CARTER. Yes.

Mr. CEDARQUIST. Yes: we agree.

383 Mr. SINSHEIMER. The Board now requests that its previous exhibits placed into the record be corrected to read Board's Exhibit numbers 101-A through 101-E inclusive.

Trial Examiner PERSONS. Yes; Mr. Hise will so correct the numbering of the exhibits accordingly.

Mr. SINSHEIMER. I now propose to read a stipulation into the record:

It is hereby stipulated and agreed as follows:

That the entire record in the matter of E. C. Atkins and Company, and International Association of Machinists, District 90, and their affiliate Local 1683, Case number 9-R-1200, be incorporated herein by reference and considered as if a part hereof specifically involving thereby, but not in any way limiting generally in the foregoing:

(1) All exhibits therein:

(2) The entire official report of the proceedings of the hearing of that case on September 24, 1943:

(3) Brief of E. C. Atkins and Company filed therein:

(4) Decision and Direction of Election of the National Labor Relations Board in said matter dated October 19, 1943:

(5) Petition of E. C. Atkins and Company dated October 28, 1943, asking reconsideration of the said Decision and Direction of Election of October 19, 1943:

(6) Order Denying Petition dated November 2, 1943:

384 (7) Report of Acting Regional Director on Order of Election, dated November 18, 1943:

(8) Affidavit as to Service thereof:

(9) Certification of Representatives dated November 29, 1943:

Now, is that statement agreed to, Mr. Pantzer?

Mr. PANTZER. Yes; I so stipulate.

Mr. SINSHEIMER. Does the Union stipulate to that statement?

Mr. RICHARDSON. Yes; we so stipulate.

Trial Examiner PERSONS. Does the Board so stipulate?

Mr. SINSHEIMER. The Board so stipulates.

Mr. PANTZER. Now, I should like to ask Mr. Sinsheimer, inasmuch as the brief which was transmitted to the Board under date of October 9, 1943, is a part of the record, and inasmuch as that brief itself did not contain a request for oral argument—whether he will stipulate that the Board make a part of the record the original letter from myself, Kurt F. Pantzer, to the National Labor Relations Board, dated October 9, 1943, in which the brief was transmitted and in which I stated, quote:

"I shall also appreciate it if you will consider this letter as a request for oral argument," end quote.

Then, going on to show Mr. Lawyer, the addressee of the 385 letter further reasons why I thought it important to have oral argument in the case.

Mr. SINSHEIMER. May I see that letter a moment, please?

Mr. PANTZER. Yes.

(Document handed to Mr. Sinsheimer.)

Mr. PANTZER. At the suggestion of counsel for the Board, Mr. Trial Examiner, it has been decided that I should offer the carbon copy of that letter in evidence as Respondent's Exhibit Number 102 and I now proceed to do so.

(Thereupon the document above referred to was marked "Respondent's Exhibit No. 102" for identification.)

Mr. PANTZER. If there is any check at the Washington office of the Board which indicates that that letter was not written or received, then the record is to be supplemented to that extent, but I take it if the brief was received, then the letter surely must have been received.

Trial Examiner PERSONS. That was the covering letter for that brief?

Mr. PANTZER. Yes.

Trial Examiner PERSONS. I take it, there is no objection to this exhibit?

Mr. SINSHEIMER. There is no objection, with that qualification, sir.

Trial Examiner PERSONS. The document will be received in evidence as Respondent's Exhibit Number 102. You
386 know of course, the requirement as to duplicate copies of exhibits in "C" cases?

Mr. PANTZER. Yes, your Honor; and I should also like to obtain permission to have any papers which go from our file, to have them photostated and substituted for such papers as exhibits in the record.

Trial Examiner PERSONS. Yes; of course, that is the usual procedure.

Mr. PANTZER. And I hope likewise to make such arrangement with the Union and attorneys for the Board?

Trial Examiner PERSONS. Well, we regularly do that in order not to rob the file of the respective parties, Mr. Pantzer, and that arrangement will be entirely satisfactory.

Mr. SINSHEIMER. May we go off the record just a minute, please, Mr. Examiner?

Trial Examiner PERSONS. Yes; off the record.

(Discussion had off the record.)

Trial Examiner PERSONS. On the record.

(The document heretofore marked "Respondent's Exhibit No. 103" for identification was received in evidence.)

Mr. SINSHEIMER. Mr. Pantzer has just handed me a statement concerning commerce which I am accepting and reading into the record. That statement reads: (Reading).

E. C. Atkins data as to commerce:

387 It is dated January 31, 1944:

(Reading from document.) E. C. Atkins and Company parenthesis herein referred to as the, quote, "Employer" end parenthesis, is a corporation organized and existing under the laws of the State of Indiana with two plants in Indianapolis, Indiana. The main plant in Indianapolis, which occupies two entire city blocks and is bounded on the north by South Street, on the west by Capitol Avenue, on the east by Illinois Street, and on the south by Merrill Street, has been in operation since 1857. The Federal Government owns the new armor plate plant employed by the Employer in war production at the southeast corner of 21st Street and Northwestern Avenue.

The Employer is engaged in the business of manufacturing and selling saws, tools and armor plate, parenthesis (hereinafter referred to as the "Business of the Employer") end quote, end parenthesis.

The facts bearing upon the question of whether the Employer is engaged in interstate commerce, and whether a question of representation affecting commerce arises, in this cause, are as follows:

1. The principal raw materials used in the Business of the Employer are steel, castings, and lumber, parenthesis (hereinafter referred to as the "Raw Materials") end quote, end parenthesis.

388 2. Approximately eighty percent of the raw materials used in the Business of the Employer is purchased and shipped in interstate commerce from sources outside the State of Indiana.

3. Approximately eighty percent of the finished products produced by the Employer is sold in interstate commerce to purchasers outside the State of Indiana.

4. During the calendar year 1943, the Raw Materials used in manufacturing the finished product of the Employer cost in excess of five hundred thousand dollars.

5. During the calendar year 1943, the gross sales price of the finished product sold by the Employer was in excess of one million dollars.

6. The Employer ships its finished products by rail and truck.

7. The finished produce of the Employer is disposed of to the United States Government, jobbers, dealers, subcontractors, and direct to manufacturing consumers.

8. The Employer advertises through industrial magazines and periodicals.

9. During the calendar year 1944, to the date of this hearing, the manufacturing and selling operations of the Employer have continued substantially along the same lines as those related, concerning the year 1943, in the preceding sections hereof.

389 Trial Examiner PERSONS. Is this stipulated by all the parties that that statement is correct in all detail?

Mr. PANTZER. We so stipulate, sir.

Mr. SINSHEIMER. The Board so stipulates.

Mr. RICHARDSON. We so stipulate.

Mr. SINSHEIMER. Now, Mr. Examiner, may be go off the record again, please?

Trial Examiner PERSONS. Yes; Mr. Sinsheimer.

Off the record.

(Discussion had off the record.)

Trial Examiner PERSONS. On the record, gentlemen.

Mr. SINSHEIMER. This is a further stipulation, as follows:

It is further stipulated that Frank M. Richardson would testify today exactly as he did on pages 42 to 49 inclusive, of the official report of proceedings, dated September 24, 1943, in case number 9–R–1200, concerning the organization and character of the International Association of Machinists, District 90, and their affiliate Local 1683:

Is that stipulation satisfactory?

Mr. PANTZER. I so stipulate.

Mr. SINSHEIMER. Mr. Richardson?

Mr. RICHARDSON. Sir?

Mr. SINSHEIMER. Is that stipulation as read satisfactory?

390 Mr. RICHARDSON. Yes.

Trial Examiner PERSONS. And the Board so stipulates?

Mr. SINSHEIMER. Yes; the Board so stipulates.

Mr. PANTZER. With the Board's permission and the Examiner's, I should like to interpolate a further stipulation, namely, that the parties hereto agree that all the other witnesses who testified at the hearing of September 24, 1943, would, if they took the stand in this hearing today, testify exactly as they did on September 24, 1943, with the exception of the natural allowances in their testimony which would have to be made as to time because of the intervening period from September 24, 1943, to January 31, 1944.

Mr. SINSHEIMER. The Board agrees to that.

Mr. RICHARDSON. Yes; we agree to that also.

Mr. PANTZER. We so stipulate also.

Now, that stipulation includes not merely the witnesses of the Respondents, but all of the other witnesses of the Board, is that right? There were other witnesses for the Board, I think.

Mr. SINSHEIMER. That would include all the witnesses who appeared at the hearing; yes.

Trial Examiner PERSONS. I take it the understanding will be, if the Trial Examiner is right, that the parties will rest upon that testimony for proof of the character of the Union, as a labor

391 organization within the meaning of the Wagner Relations Act?

Mr. PANTZER. That is right, and also for proof.

Trial Examiner PERSONS. And counterproof on the part of the Respondents also?

Mr. PANTZER. As to whether or not the plant guards which are in that union are actually employees within the meaning of the word "Employees" as used in the National Labor Relations Act.

Trial Examiner PERSONS. Do I understand, from your answer, Mr. Pantzer, that the Respondent will stipulate that the Machinists is a labor organization within the meaning of the Act?

Mr. PANTZER. Well, you did not exactly so state that, Mr. Examiner. In answer to the allegation that it was a union within the meaning of the Act the Answer states that the Respondent denies the fact alleged in Paragraph 3 of the Complaint and affirmatively substantiates such denial with the allegation that the members of such unit are not employees within the meaning of Section 2 of the National Labor Relations Act and its various subdivisions.

Now, in other words, I feel that the union cannot be a union with respect to this Respondent unless the persons who are members of the union are employees of this Respondent.

Now, I do not intend to contest the fact that the Union is a nationally recognized labor organization; that the Union
392 has a District 90 and the particular local number 1683 involved in this case. The point I am trying to raise by my answer to the Complaint's allegation in Paragraph 3 is the point that these are not employees.

I do not wish to waive that particular point in my admission that it is a union.

Now, that being so, I think it is perfectly apparent to your Honor that I am not contesting that with respect to any other purpose than the issue that I raised in the representation case, to the effect that the union was then and is now a union within the meaning of the National Labor Relations Act.

Trial Examiner PERSONS. Would the Board wish to make a statement?

Mr. SINSHEIMER. The Board would like to say this:

That the Board does not intend to limit its proof of the facts as to whether or not these are employees, to those eight or nine pages which have just been stipulated to be a part of the record, but the entire testimony at that hearing goes to the question of whether they are, or are not, employees of the Respondent.

The Board only—the Board primarily introduced those eight pages for the purpose of establishing the fact that the Union is a labor organization within the meaning of the Act.

Trial Examiner PERSONS. Thank you, Mr. Pantzer, for your very clear statement.

393 Am I right in understanding that the parties propose to rest upon the testimony presented in the previous "R" proceeding on this particular issue?

Mr. SINSHEIMER. The Board does.

Mr. PANTZER. Yes; we do, too.

Trial Examiner PERSONS. Thank you, gentlemen.

Mr. PANTZER. We should have liked to introduce the additional evidence requested upon the subpoena duces tecum on this point because I can conceive that it has a direct bearing with respect to this union, on the kind of employees which are the plant guards in the E. C. Atkins and Company, but in the absence of that kind of testimony we shall have to be bound by the record in the preceding case.

Certainly we have no further testimony to offer on the subject.

Mr. SINSHEIMER. It is further stipulated that the National Labor Relations Board in its Decision and Direction of Election of October, 19, 1943, in the matter of E. C. Atkins and Company and the Respondent herein, and the International Association of Machinists, District 90, and their affiliate Local 1683, Case Number 9-R-1200 found, quote [reading from document]:

"* * * that all plant guards at the Company's two Indian-
apolis plants, excluding the chiefs and lieutenants and other
394 supervisory employees with authority to hire, promote, dis-
charge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of the Section 9 (b) of the Act.", end quote.

Is that so stipulated?

Mr. PANTZER. Yes; that is so stipulated.

Trial Examiner PERSONS. And, of course, the Board?

Mr. RICHARDSON. The Union so stipulates.

Trial Examiner PERSONS. And, of course, the Board?

Mr. SINSHEIMER. The Board so stipulates.

Mr. PANTZER. Of course, the actual Decision and language of the Order is, of course, paramount—the Decision and Direction of Election is, of course, paramount, but as I checked and followed the attorney for the Board as to what he was reading into the record, I found he was reading it accurately.

Mr. SINSHEIMER. It is further stipulated that on November 29, 1943, the Board in its Certification of Representatives stated, quote [reading from document]:

"It is hereby certified that International Association of Ma-
chinists, District 90, and their affiliate, Local 1683, has been des-
ignated and selected by a majority of all plant guards at
395 the two Indianapolis plants of E. C. Atkins and Company,
Indianapolis, Indiana, excluding the chiefs and lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, as their representatives for the purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act, the said organization is the exclusive representative of all such employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment." End quote.

Mr. PANTZER. I so stipulate.

Mr. SINSHEIMER. The Board so stipulates.

Mr. CARTER. The Union so stipulates.

Mr. SINSHEIMER. Off the record, please?

Trial Examiner PERSONS. Yes, sir. Off the record.

(Discussion had off the record.)

Trial Examiner PERSONS. Back on the record, gentlemen.

Mr. SINSHEIMER. I now offer for identification, as Board's Exhibit Number 102, a copy of a proposed agreement between E. C. Atkins and Company, Indianapolis, Indiana, and the International Association of Machinists, District 90, and its affilated Local Lodge Number 1683.

(Thereupon the document above referred to was marked "Board's Exhibit No. 102" for identification.)

396 Mr. SINSHEIMER. I would like to call attention at this time to the fact that there is some handwriting on the upper right-hand corner of the first page of this document, reading "Exhibit D" which should be crossed off the exhibit as having no relationship to this matter.

Mr. PANTZER. Let the reporter so cross it off?

Trial Examiner PERSONS. That may be done.

(The reporter complied with instructions of Trial Examiner.)

Trial Examiner PERSONS. Is that satisfactory to you, Mr. Pantzer?

Mr. PANTZER. I wish to say again that I can ave no objection to this Board's Exhibit Number 102 on the basi of authenticity, or that it was received.

My objection to the introduction of this exhibit in evidence is predicted, of course, upon the Trial Examiner's refusal to grant me the application for a subpoena duces tecum which would have shown, I submit, in the collective-bargaining agreement which this Local has with other plants in this town—would have adduced in evidence that certain of the demands in this Board's Exhibit Number 102 were changed by the processes of collective bargaining and that some of them were not; and the extent to which those demands, those demands which were not so changed by collective bargaining, were incompatible with the best

397 interests of the military service.

Trial Examiner PERSONS. I take it when you say "they were changed" you mean in the other plants that similar agreements were presented and in process of collective bargaining that they were modified?

Mr. PANTZER. Yes. Now, where you say "were modified," I cannot, of course, say as to that. I assume that bargaining would have had some effect upon the demands and that it certainly would not have been signed verbatim by any employer. I have had no means of finding out wherein those demands were changed in the processes of collective bargaining.

Now, that is my only objection, Mr. Examiner. My objection is not directed to the authenticity of the paper, nor to the fact that it was received.

Trial Examiner Persons. Nor to the fact that it was presented to the Company?

Mr. Pantzer. We admit that it was presented to the Company.

Trial Examiner Persons. The Union is satisfied with that?

Mr. Carter. Yes; we are satisfied.

Trial Examiner Persons. The document will be received in evidence——

Mr. Sinsheimer. Well, I'd like to make one further statement concerning this——

398 Trial Examiner Persons. Yes; I am sorry. Proceed, Mr. Sinsheimer.

Mr. Sinsheimer. I believe we can stipulate this was sent by the Union to the Company some time between December first and December twentieth 1943, and received by the Company some time in between those dates.

Mr. Pantzer. We so stipulate.

Trial Examiner Persons. Is that the best you can do on those dates, Mr. Sinsheimer?

Mr. Pantzer. That is the best he can do, sir, and the best I can do. No letter was sent with the proposal and the envelope was not retained by the Personnel Department at the plant.

Trial Examiner Persons. The Union is agreeable to those dates?

Mr. Richardson. Yes, sir.

Trial Examiner Persons. The Exhibit, Board's Exhibit Number 102, will be received in evidence.

(The document heretofore marked "Board's Exhibit No. 102" for identification was received in evidence.)

Mr. Sinsheimer. I now offer for identification, as Board's Exhibit Number 103, a copy of a letter dated December 20, 1943, from E. C. Atkins and Company to the International Association

399 of Machinists, signed by Forrest E. Wood, Personnel Director.

This exhibit also bears a marking on the upper righthand corner, "Exhibit E," which has no relation to this case and I ask that it be crossed off the exhibit.

Trial Examiner Persons. That may be done by the reporter, as heretofore handled.

(The reporter complied with the Examiner's instructions.)

(Thereupon the document above referred to was marked "Board's Exhibit No. 103" for identification.)

Trial Examiner Persons. Is the exhibit satisfactory to the Company?

Mr. Pantzer. Yes, sir.

Trial Examiner Persons. And the Union?

Mr. Richardson. Yes, sir; it is.

TRIAL EXAMINER PERSONS. The document will be received in evidence as Board's Exhibit Number 103.

(The document heretofore marked "Board's Exhibit No. 103" for identification was received in evidence.)

Mr. SINSHEIMER. I now offer for identification Board's Exhibit Number 104, which is a copy of a letter dated December 22, 1943, from Kurt F. Pantzer to Mr. John Gettreau, concerning E. C. Atkins and Company.

This exhibit also bears a notation, "Exhibit F," which
400 has no relation to this case and I ask that it be crossed off the exhibit.

TRIAL EXAMINER PERSONS. That may be done. I think Mr. John Gettreau should be identified, Mr. Sinsheimer.

Mr. SINSHEIMER. Mr. Gettreau is in charge of the Indianapolis Division of the National Labor Relations Board and is a Field Examiner for the Board. Is that statement acceptable?

Mr. SHROYER. Off the record a moment, please.

TRIAL EXAMINER PERSONS. Off the record.

(Discussion had off the record.)

TRIAL EXAMINER PERSONS. On the record.

Mr. SINSHEIMER. I should like to correct that statement as follows:

Mr. John Gettreau is a Senior Field Examiner for the Ninth Region of the National Labor Relations Board.

TRIAL EXAMINER PERSONS. Cutting out the reference to the Indianapolis Division?

Mr. SINSHEIMER. Yes; that strikes the reference to the Indianapolis Division.

Mr. PANTZER. We so stipulate.

TRIAL EXAMINER PERSONS. And the Union so accepts that?

Mr. RICHARDSON. Yes.

TRIAL EXAMINER PERSONS. The document will be received in evidence as Board's Exhibit Number 104.

401 (Thereupon the document above referred to was marked "Board's Exhibit No. 104" for identification and received in evidence.)

Mr. SINSHEIMER. I now offer for identification, as Board's Exhibit Number 105, a copy of Brief of E. C. Atkins and Company in the matter of E. C. Atkins and Company and the International Association of Machinists, District 90, and its affiliate Local 1683, being case Number 9-R-1200, and which is referred to in Board's Exhibit Number 104, and accompanied Board's Exhibit Number 104 and which is also the same brief which was filed in that case, Number 9-R-1200.

(Thereupon the document above referred to was marked "Board's Exhibit No. 105" for identification.)

Trial Examiner PERSONS. I think you have already made that a part of the record?

Mr. SINSHEIMER. Yes; we are putting this in the record for the convenience of the Examiner and others.

That exhibit also bears a marking, "Exhibit B," which should be removed.

Trial Examiner PERSONS. That marking shall be removed by the reporter in accordance with previous instructions.

(The reporter complied with the Examiner's instructions.)

Mr. SINSHEIMER. I now offer for identification, as Board's Exhibit Number 106, Petition of E. C. Atkins and Company for Re-
consideration of Decision and Direction of Election, dated
402 October 19, 1943, Oral Argument thereon before the Full Board, and Memorandum in Support thereof, in Case Number 9–R–1200, dated October 28, 1943.

This also is referred to in Board's Exhibit Number 104 and accompanied Board's Exhibit Number 104 and was filed in Case Number 9–R–1200.

It likewise bears a notation "Exhibit C," which has no bearing to the exhibit and should be crossed off.

Trial Examiner PERSONS. The reporter will accordingly cross off the notation as previously instructed, and the document may be marked for identification as Board's Exhibit Number 106.

(Thereupon the document above referred to was marked "Board's Exhibit No. 106" for identification.)

Trial Examiner PERSONS. Are you offering them now?

Mr. SINSHEIMER. Yes; I now offer Board's Exhibits Numbers 105 and 106 in evidence.

Mr. PANTZER. No objection.

Mr. CARTER. No objection.

Trial Examiner PERSONS. The documents will be received in evidence in their proper rotation, as Board's Exhibits Numbers 105 and 106, in evidence.

(The documents heretofore marked for identification as "Board's Exhibits Nos. 105 and 106" were received in evidence.)

Mr. SINSHEIMER. At this time I would like to call to
403 the Trial Examiner's attention that in Paragraph 7 of Respondent's Answer, the Respondent insists that the Union has requested bargaining rights, and in Paragraph 8 the Respondent admits that the Company has refused to bargain with the Union. I believe Mr. Pantzer desires to make a statement as to that——

Mr. PANTZER. I merely desire to call the Trial Examiner's attention to the two qualifications I set forth in the Answer to those two admissions which are dependent, of course, upon the definition of the word "employees."

Trial Examiner PERSONS. I think it might be helpful to the record if you would tell us how the Company received that proposed agreement, whether there were any definite demands or requests for changes in the document itself.

Mr. PANTZER. I cannot state how the Respondent received the proposed agreement prior to December 20, from my own knowledge, but I state, subject to correction by Mr. Richardson over at the Union's table there, that it was received in an envelope through the United States mail, addressed to E. C. Atkins and Company, Indianapolis, Indiana, without any forwarding letter.

Mr. RICHARDSON. That's right.

Trial Examiner PERSONS. Will the Respondent agree that that was, in effect, a request for collective bargaining?

Mr. PANTZER. Yes; I do not wish to quibble with the

404 Trial Examiner. Quibbling is possible, but I should say that even if the Company has not had much experience with such requests, the attorney for the Company has had and the attorney for the Company should have advised the Company that it was such a request.

Trial Examiner PERSONS. Thank you, sir.

Mr. SINSHEIMER. The Board rests.

Trial Examiner PERSONS. Do you have matters to present, Mr. Pantzer?

Mr. PANTZER. I have no testimony or exhibits to submit in answer to the Board's case, but wish to be permitted this statement:

That the Respondent will, if it is finally determined that the Respondent's contention as to the definition of the word "employees" is incorrect, gladly bargain with the Union in this case and that the Respondent, as an employer, has no animosity whatever toward Mr. Richardson, who has been the organizer of the Union and who has behaved himself and counseled members of the Union to behave themselves, with exemplary conduct in this case.

(To Mr. Richardson). I want you to know, Mr. Richardson, there is absolutely nothing personal in this position which we are taking, and which I think you understand.

Mr. RICHARDSON. Yes, sir.

405 Trial Examiner PERSONS. There is one little matter that I read in the Answer, Mr. Pantzer, upon which I would be glad to have your definition, in Paragraph 5 on page 2, wherein you speak about the Board's election and wherein you state "* * * but the Respondent denies that such secret ballot election was properly conducted * * *" and et cetera, and my question is about your phrase "denies * * * such * * * election was properly conducted * * *" and my question is: What connotation is intended by that, sir?

Mr. PANTZER. There is no connotation intended by that language that the election was conducted other than in a very fair and accurate way and that the ballots were cast as shown by the certificate; that the ballots were counted and that the results were as shown.

In other words, on the matter of the fairness of the election, there is no contention.

The only contest is that it was not a proper election in the light of the fact that the plant guards who voted in that election were not employees of the Respondent within the meaning of the word "employees" as defined in the National Labor Relations Act and that consequently the election was improper in that the Board had absolutely no jurisdiction in the premises.

Trial Examiner PERSONS. But there is no contest as to the conduct of the election itself?

406 Mr. PANTZER. None whatever. I believe, of course, that the stipulation as to the exhibits and the record implies, does it not, Mr. Examiner, that the evidence therein contained is all evidence in support of my answer as well as evidence in support of the allegations in the complaint?

Trial Examiner PERSONS. I so understand it.

Mr. SINSHEIMER. That is my understanding.

Trial Examiner PERSONS. I guess my further question is an excess of caution, perhaps, but in this Paragraph number 19, the exceptions referred to are not exceptions taken to the election or its conduct, or the result, but only on the record of the previous "R" proceedings; is that correct, Mr. Pantzer?

Mr. PANTZER. That is true, Mr. Examiner, with the sole exception already averted to, namely, that I do not think the election itself was proper in that the Board had jurisdiction to conduct it at all.

Trial Examiner PERSONS. I take it that will be abundantly clear in the record, sir.

Have you anything further?

Mr. PANTZER. There is nothing further.

Mr. SINSHEIMER. The Board would like to——

Trial Examiner PERSONS. The Respondent rests?

Mr. PANTZER. I have nothing further. The Respondent rests.

407 Mr. SINSHEIMER. The Board would like to ask one further question of Mr. Pantzer:

Will you stipulate, Mr. Pantzer, that you are the same Mr. Pantzer who wrote the letter dated December 22, 1943, which appears as Board's Exhibit Number 104, and that you are and that you were at that time, attorney for E. C. Atkins and Company, and represented E. C. Atkins and Company?

Mr. PANTZER. Yes.

Mr. SINSHEIMER. And also that Mr. Wood was at the time of the date of the letter, which appears in this record as Board's Exhibit Number 103, on December 20, 1943, was the Personnel Director of E. C. Atkins and Company?

Mr. PANTZER. That is true.

Trial Examiner PERSONS. Is he no longer?

Mr. PANTZER. He is still, and continues to be such Personnel Director.

Mr. SINSHEIMER. That is all for the Board.

Trial Examiner PERSONS. Anything further from any of the parties?

(No response.)

Trial Examiner PERSONS. Hearing nothing further, this hearing is now closed.

I take it, gentlemen, you understand the rules of procedure? I don't think we need go into that, do we?

Mr. PANTZER. Well, I should for the record to have you
408 repeat that, because the rules have been changed so frequently, sir.

Trial Examiner PERSONS. There is one thing I should have stated. You may give oral argument before the Trial Examiner if you so desire, but I assume from your experience in such matters, Mr. Pantzer, that you have no desire to orally argue this case at this time?

Mr. PANTZER. I have no desire to argue the case at this time, your Honor. I think the Trial Examiner understands the point we make.

Trial Examiner MYERS. Well, the rules provide that the parties to the proceeding may request an opportunity to present briefs to the Trial Examiner——

Mr. PANTZER. We make no such request at this time, but ask that our rights be preserved in the event we desire so to do.

Trial Examiner PERSONS. The Board does not intend to file a brief?

Mr. SINSHEIMER. The Board does not intend to file a brief.

Trial Examiner PERSONS. And the Union—does it intend to file a brief?

Mr. CARTER. No.

Trial Examiner PERSONS. As you know, the rules further pro-
409 vide that you may present exceptions to the intermediate report of the Trial Examiner which may be accompanied by a brief and request for oral argument before the Board, should be made within ten days of the transfer of the case to the Board.

I have not previously said it, but I take it that you understand that the Trial Examiner's intermediate report is served upon the parties and becomes a part of the record?

Mr. PANZER. We again here, and whether we have a right to make such request or not, in this phase of the proceedings—but we here, again, respectfully ask for the right to argue this case orally before the Full Board.

The reason we are not asking that the right to argue it here before your Honor is simply because the briefs set forth clearly what arguments have hitherto been made and we feel those are

the arguments to which you should direct yourself in deciding the case.

Trial Examiner PERSONS. I have nothing whatever to say about your request for argument before the Board, but I repeat that should be made within ten days of your notice of its being transferred to the Board.

Anything further?

(No response.)

Trial Examiner PERSONS. Hearing nothing further, the hearing is now closed.

(At 11:45 o'clock a. m., Monday, January 31, 1944, the hearing in the above-entitled matter was closed.)

411 *Board's Exhibit 101-A*

United States of America

Before the National Labor Relations Board

Ninth Region

Case No. 9-C-1982

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90, AND THEIR AFFILIATE LOCAL 1683, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR

COMPLAINT

It having been charged by International Association of Machinists, District 90, and their affiliate Local 1683, 49½ South Delaware Street, Indianapolis, Indiana, affiliated with the American Federation of Labor, herein called the Union, that E. C. Atkins and Company, Indianapolis, Indiana, herein called the respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, 49 Stat. 449, herein called the Act, the National Labor Relations Board, by the Acting Regional Director for the Ninth Region, as agent of the National Labor Relations Board, designated by the National Labor Relations Board Rules and Regulations—Series 3, Article IV, Section 1, hereby issues its complaint and alleges as follows:

1. E. C. Atkins and Company is a corporation organized and existing by virtue of the laws of the State of Indiana, with its principal office and places of business located in Indianapolis, Indiana, and has at all times herein mentioned continuously
412 engaged at said places of business in the manufacture and sale of saws, tools, and armor plate.

2. The respondent, in the course and conduct of its business as aforesaid, causes and has continuously caused a substantial part of the materials and products used in its operations described

above, to be delivered and transported in interstate commerce to its place of business in the State of Indiana, and causes and has continuously caused the greater part of the products manufactured, sold and distributed by it in its business as aforesaid, to be delivered and transported from its places of business in the State of Indiana to and through states of the United States other than the State of Indiana.

3. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

4. All plant guards at the two Indianapolis plants of the respondent, excluding the chief and lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (*b*) of the Act, as found by the National Labor Relations Board in its Decision and Direction of Election of October 19, 1943, in the matter of E. C. Atkins and Company and International Association of Machinists, District 90, and their affiliate Local 1683, Case No. 9–R–1200.

5. On November 17, 1943, the employees in the appropriate unit described in paragraph 4 above, designated and selected the Union as their representative for the purposes of collective bargaining by a secret ballot election conducted under the supervision of the Acting Regional Director for the Ninth Region of the National Labor Relations Board, pursuant to the Decision and Direction of Election of the National Labor Relations Board of October 19, 1943, in the matter of E. C. Atkins and Company and International Association of Machinists, District 90, and their
413 affiliate Local 1683, Case No. 9–R–1200. On November 29, 1943, the Union was certified as the representative for the purposes of collective bargaining of the employees in the above-described appropriate unit by the National Labor Relations Board pursuant to Section 9 (c) of the Act, notice of which certification was duly given the respondent and the Union.

6. At all times since November 17, 1943, the Union has been the representative for the purposes of collective bargaining of the employees in said unit, and by virtue of Section 9 (a) of the Act, has been and now is the exclusive bargaining agent for all the employees in said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

7. On or about December 14, 1943, and on numerous occasions thereafter, the Union requested the respondent to bargain with it as the exclusive representative of the employees in the unit described in paragraph 4 above, in respect to rates of pay, wages, hours of employment, and other conditions of employment.

8. On or about December 14, 1943, and at all times thereafter, the respondent refused, and has since continued to refuse, to bar-

gain collectively with the Union as the exclusive representative of the employees in the unit described in paragraph 4 above.

9. By the acts described in paragraph 8 above, the respondent has engaged in and is thereby engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

10. By the acts described in paragraph 8 above, the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby engage in and is thereby engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

414 11. The activities of the respondent described in paragraph 8 above, occurring in connection with the operations of the respondent described in paragraphs 1 and 2 above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lend to labor disputes, burdening and obstructing commerce and the free flow of commerce.

12. The acts of the respondent as herein above set forth constitute unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5), and Section 2 (6) and (7) of the Act.

Wherefore, the National Labor Relations Board, on this 12th day of January, 1944, issues its complaint against E. C. Atkins and Company, the respondent herein.

415 United States of America

Before the National Labor Relations Board

Ninth Region

Case No. 9–C–1982

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90, AND THEIR AFFILIATE LOCAL 1683, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR

NOTICE OF HEARING

Please take notice that on the 31st day of January 1944, at 10:00 o'clock in the forenoon, in Room 216, Federal Building, Indianapolis, Indiana, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that you have the right to file with the undersigned Regional Director, acting in this matter as agent of

the National Labor Relations Board, an answer to the said Complaint within ten (10) days from the service thereof.

Please take notice that duplicates of all exhibits which are offered in evidence will be required unless, pursuant to request or motion, the Trial Examiner in the exercise of his discretion and for good cause shown, directs that a given exhibit need not be duplicated.

In witness whereof the National Labor Relations Board has caused this, its Complaint and Notice of Hearing, to be signed by the Acting Regional Director for the Ninth Region on this 12th day of January 1944.

[SEAL]

Rosemary S. Macke,
ROSEMARY S. MACKE,
Acting Regional Director,
National Labor Relations Board, Ninth Region.

416

Board's Exhibit 101–B

United States of America

Before the National Labor Relations Board

Ninth Region

Case No. 9–C–1982

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90, AND THEIR AFFILIATE LOCAL 1683, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR

AFFIDAVIT AS TO SERVICE

STATE OF OHIO,
County of Hamilton, ss:

I, Bertie Workman, being duly sworn, depose and say that I am an employee of the National Labor Relations Board, in the 9th Region at Cincinnati, Ohio; on the 12th day of January 1944, I served by postpaid registered mail, bearing Government frank, a copy of Complaint and Notice of Hearing, and Copy of Charge, to the following-named persons, addressed to them at the following addresses: E. C. Atkins and Company, 402 South Illinois St., Indianapolis, Ind.; International Association of Machinists, District 90, and their Affiliate Local 1683, A. F. of L., Mr. Frank M. Richardson, Bus. Rep., 491½ S. Delaware St., Indianapolis, Ind.

BERTIE WORKMAN.

Subscribed and sworn to before me this 13th day January 1944.

GRACE FRAZIER,
Designated Agent.

417 *Board's Exhibit 101–C*

United States of America

Before the National Labor Relations Board

Ninth Region

Case No. 9–C–1982

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT 90, AND THEIR AFFILIATE LOCAL 1683, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR

ORDER GRANTING MOTION

The motion of the respondent in the above-entitled matter, for extension of time to January 29, 1944, for filing its answer, is hereby granted.

Dated, Cincinnati, Ohio, this 27th day of January, 1944.

[SEAL] Martin Wagner,
MARTIN WAGNER,
Regional Director,
National Labor Relations Board.

418 *Board's Exhibit 101–D*

United States of America

Before the National Labor Relations Board

Ninth Region

Case No. 9–C–1982

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT 90, AND THEIR AFFILIATE LOCAL 1683, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR

AFFIDAVIT AS TO SERVICE

STATE OF OHIO,
County of Hamilton, ss:

I, Lelia H. Scallan, being duly sworn, depose and say that I am an employee of the National Labor Relations Board, in the Ninth Region at Cincinnati, Ohio; on the twenty-seventh day of January 1944, I served by postpaid registered mail, bearing Government frank, a copy of Order Granting Motion, to the following named persons, addressed to them at the following addresses: E. C. Atkins and Company, 402 South Illinois St., Indianapolis, Ind.; Inter-

national Association of Machinists, District 90, and their Affiliate Local 1683, A. F. of L., Mr. Frank M. Richardson, Bus. Rep., 491½ S. Delaware St., Indianapolis, Ind.

LELIA H. SCALLAN.

Subscribed and sworn to before me this 28th day of January, 1944.

GRACE FRAZIER,
Designated Agent.

419 *Board's Exhibit 101–F*

United States of America

Before the National Labor Relations Board

Ninth Region

Case No. 9–C–1982

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS DISTRICT 90, AND THEIR AFFILIATE LOCAL 1683, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR

ANSWER OF RESPONDENT, E. C. ATKINS AND COMPANY

The Respondent, E. C. Atkins and Company, for answer to the Complaint herein, alleges as follows:

1. The Respondent admits the facts alleged in paragraph 1 of the Complaint.

2. The Respondent admits the facts alleged in paragraph 2 of the Complaint.

3. The Respondent denies the facts alleged in paragraph 3 of the Complaint; and affirmatively substantiates such denial with the allegation that the members of the Union are not "employees" within the meaning of Section 2 of the National Labor Relations Act, and its various subdivisions.

4. The Respondent denies the facts alleged in paragraph 4 of the Complaint; and affirmatively substantiates such denial with
420 the allegation that the plant guards at the two Indianapolis plants of the Respondent are not "employees" within the meaning of Section 2 of the National Labor Relations Act, and its various subdivisions, and consequently cannot constitute a unit appropriate for the purposes of collective bargaining.

5. The Respondent admits that an election by secret ballot of certain of the plant guards at the two Indianapolis plants of the Respondent was held on November 17, 1943; and further admits that on November 29, 1943, the National Labor Relations Board

certified the Union as the representative, for the purposes of collective bargaining, of such plant guards; but the Respondent denies that such secret ballot election was properly conducted, or that such plant guards were "employees" of the Respondent within the meaning of the word "employee," as used in Section 2 of the National Labor Relations Act, and its various subdivisions. The Respondent also admits that notice of the certification of the National Labor Relations Board was duly given the Respondent; but has no knowledge as to whether such notice was given the Union.

6. The Respondent denies the facts alleged in paragraph 6 of the Complaint.

7. The Respondent admits the facts alleged in paragraph 7 of the Complaint, except to the extent of the conclusion inferable therefrom that the "employees" therein described were employees of the Respondent within the meaning of that word as used in Section 2 of the National Labor Relations Act, and its various subdivisions.

8. The Respondent admits the facts alleged in paragraph
421 8 of the Complaint, except to the extent of the conclusion inferable therefrom that the "employees" therein described were employees of the Respondent within the meaning of that word as used in Section 2 of the National Labor Relations Act, and its various subdivisions.

9. The Respondent denies the facts alleged in paragraph 9 of the Complaint.

10. The Respondent denies the facts alleged in paragraph 10 of the Complaint.

11. The Respondent denies the facts alleged in paragraph 11 of the Complaint.

12. The Respondent denies the facts alleged in paragraph 12 of the Complaint.

13. The Respondent further alleges that the Respondent is not, and cannot be, an employer within the meaning of Section 2 of the National Labor Relations Act, or any of its subdivisions, with respect to the "plant guards" referred to in the Complaint, because all of them were "auxiliary military police" under the jurisdiction and control of the Continuous Security District Office of the War Department of the United States of America, located in Cincinnati, Ohio; and because all such "auxiliary military police" were in the Federal Military Service at all times alleged in the Complaint.

14. The Respondent further alleges that the "employer" of the "plant guards," referred to in the Complaint, is the United States of America, and that consequently the Respondent cannot be their "employer" within the meaning of Section 2, subdivision 2 of the National Labor Relations Act.

422 15. The Respondent further alleges that the relationship of employer and employee, with its various incidents, has never existed as between the Respondent and the plant guards referred to in the Complaint, and that consequently the relationship between the Respondent and such plant guards is not subject to the jurisdiction of the National Labor Relations Board under any of the provisions of the National Labor Relations Act.

16. The Respondent further alleges that the Union purports to represent plant guards at various other plants in the Indianapolis area; which plant guards have not been sworn into the Military Service under the Articles of War; and the Respondent further alleges, upon information and belief, that the collective bargaining agreements executed between the Union and the corporations at which such plant guards are stationed, respectively, contain provisions respecting seniority, discipline, handling of grievances, vacations, hours of work, and other incidents of tenure, which are incompatible with the Articles of War and military orders pursuant to which the auxiliary military police at the plants of the Respondent are subject to the jurisdiction of the Continuous Security District Office of the War Department of the United States of America, located in Cincinnati, Ohio; and that consequently any order directing the Respondent to bargain with respect to such incidents of employment with the plant guards at the plants of the Respondent is void and of no force and effect.

17. The Respondent further alleges that the hearing, which resulted in the Decision and Direction of Election of the National Labor Relations Board, entered October 19, 1943,
423 was held without due process of law because of the denial, in part, of the Respondent's application for subpoenas duces tecum directed at F. M. Richardson, the Business Representative of the Union, to produce union records and that consequently said Decision and Direction of Election is void and of no force and effect as against the Respondent.

18. The Respondent further alleges that the Decision and Direction of Election, entered October 19, 1943, and the Certification, entered by the Board on November 29, 1943, are void, because the National Labor Relations Board denied the repeated written requests of the Respondent for permisison to appear before the Board and make argument of the issues raised by the Respondent; the Respondent never having been permitted to address argument respecting the Respondent's points to any member or representative of the Board, who prepared the Decision and Direction of Election, entered October 19, 1943, or the Certification, entered November 29, 1943.

19. The Respondent further alleges that the Certification of the National Labor Relations Board, entered November 29, 1943, is based in whole upon an investigation pursuant to Section 9, Sub-

section (c) of the National Labor Relations Act, and that the record of such investigation (including the Petition for Certification, Proof of Service thereof, Transcript of verbal testimony, and written exhibits, briefs, Decision and Direction of Election, and final Certification) evidences a denial of due process within the meaning of the Fifth Amendment to the Constitution of the
424 United States; and the Respondent respectfully prays leave to incorporate all the objections and exceptions in such record by reference thereto, as defenses to the Complaint.

20. The Respondent further alleges that the record of investigation, referred to in the last preceding paragraph of this Answer, and the defenses, objections, and exceptions of the Respondent therein disclosed are material to the defense of the Respondent herein; and the Respondent therefore respectfully requests the National Labor Relations Board to produce the original copy of such record at the hearing upon the Complaint.

Wherefore, the Respondent respectfully prays that the Complaint herein be dismissed.

E. C. ATKINS AND COMPANY,
Respondent,
By HENRY C. ATKINS, Jr.,
Vice President.

MESSRS. BARNES, HICKAM, PANTZER & BOYD,
Attorneys for Respondent,
1313 Merchants Bank Building, Indianapolis Indiana.
KURT F. PANTZER,
LEWIS D. SPENCER,
Of Counsel.
Dated January 27, 1944.

425 STATE OF INDIANA,
County of Marion, ss:

Henry C. Atkins, Jr., being first duly sworn, upon his oath says: That he is a Vice-President of E. C. Atkins and Company, the Respondent in the "Answer of Respondent, E. C. Atkins and Company," which precedes this jurat; that he has read such Answer; and that the facts therein are true as he verily believes.

Further the affiant saith not.

HENRY C. ATKINS, Jr.

Subscribed and sworn to before me, a Notary Public in and for said county and state, this 27th day of January 1944.

[SEAL] Thelma Blessing.
THELMA BLESSING,
Notary Public.

My commission expires June 5, 1947.

427 *Board's Exhibit 102*

AN AGREEMENT BETWEEN THE E. C. ATKINS COMPANY, INDIANAPOLIS, INDIANA, AND THE INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT NO. 90, AND ITS AFFILIATED LOCAL LODGE NO. 1683

PREAMBLE

E. C. Atkins Company and the International Association of Machinists, District No. 90, and its affiliated Local Lodge No. 1683, desiring to promote and improve relationship between the parties, and to establish basic understanding as to hours of work, conditions of employment, rates of pay and to provide a fair and equitable method of handling and adjusting grievances, have negotiated and do hereby agree to the following Articles of Agreement at Indianapolis, Indiana, on this ____ day of _____, 1943.

Article I—Recognition

SECTION 1. Recognition.—E. C. Atkins Company, hereinafter called the Company, does hereby recognize the International Association of Machinists, District No. 90, and its Affiliated Plant Protection Local Lodge No. 1683, hereinafter called the Union, as the exclusive bargaining agent within the meaning of the National Labor Relations Act, for its employees in the unit described in Section 2 of this Article.

SECTION 2. Unit.—The National Labor Relations Board has certified and the Company and the Union do hereby agree that the Unit appropriate for collective bargaining purposes, hereinafter called the Unit, shall consist of "all guards of E. C. Atkins Company, excluding Captain, Director and Assistant Director, and all other employees."

SECTION 3. Union Shop.—The employees of the Company within the Unit described in Section 2 of this Article shall become members of the Union within thirty (30) days after the effective
428 date of this Agreement, and as a condition of employment shall remain members in good standing in the Union during the life of this Agreement. New employees and employees now serving their probationary period shall become members of the Union at the expiration of their probationary period and shall remain members in good standing in the Union as a condition of employment during the life of this Agreement.

Article II—Representation

SECTION 1. Shift Committeemen.—The Union shall appoint or elect not more than one (1) Shift Committeeman for each shift

or crew. It shall be the duty of the Shift Committeeman to take up with the proper Company officer grievances or suggestions from employees on his shift or crew.

SECTION 2. Negotiating and Grievance Committee.—The Negotiating and Grievance Committee shall consist of four (4) members and shall handle grievances or suggestions referred to them by the Shift Committeeman, which are not satisfactorily adjusted by the Shift Committeeman. Representatives of District No. 90 and the International Union may be present at any, or all, of the meetings for the purpose of collective bargaining, or the handling of grievance matters.

SECTION 3. Change in Union Officers.—The personnel of the Shift Committee and the Negotiating and Grievance Committee shall be certified to the Company and the Union shall promptly advise the Company of any changes in such personnel as they occur.

SECTION 4. Regular Meetings.—Company representatives and the Negotiating and Grievance Committee shall meet monthly for the purpose of considering any grievances, suggestions, or other matters ordinarily considered at such joint meetings. In case an emergency arises, meetings may be held more often by mutual agreement.

429 ARTICLE III—GRIEVANCE PROCEDURE

SECTION 1. Steps in Procedure.—It is agreed that grievance procedure shall be as follows:

A. Whenever an employee in the Unit believes that the Company is violating any part of this Agreement, or that he is being unjustly or unfairly dealt with by any officer or agent of the Company, he may go to either the Sergeant on his shift, or Shift Committeeman and state his grievance or suggestion. The Sergeant, the employee, and the Shift Committeeman shall make every honest effort to adjust all grievances or complaints.

B. If, under Section A, adjusting of the employee's grievance is not reached within three (3) days, the matter shall be referred to the Negotiating and Grievance Committee by the employee or the Shift Committeeman. The Sergeant shall refer the matter to the Captain, or the Director of the Plant Protection Force.

C. If the Negotiating and Grievance Committee is unable to reach a satisfactory adjustment with the Captain, or the Director of the Plant Protection Force, the Committee shall then appeal the matter to the Executive Officers of the Company. In this final step the Company and the Union, either separately or jointly, may invoke the aid of the Conciliation Service of the United States Department of Labor, or any other United States Government or a State Government Agency that may have jurisdiction over the matters in dispute.

430 D. An aggrieved employee shall be subject to call by the Company or the Union to appear in any or all of the foregoing conferences for the purpose of giving testimony having a bearing on the case. Likewise, equal rights shall be given the aggrieved employee to be present at such conferences on his own initiative, providing such desire is presented in writing to the Negotiating and Grievance Committee within five (5) days from the initial date of filing the grievance.

SECTION 2. Records.—All grievances shall be in writing and in duplicate. When a grievance has been settled or adjusted one copy will be filed by the Company and one by the Union as a matter of permanent record; providing, however, that if a grievance is adjusted between the Shift Committeeman and the Sergeant, no written record is required. All cases handled by the Negotiating and Grievance Committee shall be in writing, and the Company shall give written decisions on each separate case, a copy of such written decision to be sent to the Office of District No. 90.

SECTION 3. Appeal.—Any alleged grievance not appealed from a decision at one step of the procedure to the next step within five (5) days of the Company's written decision shall be conclusively presumed to be settled on the basis of the last decision, which decision shall be binding and not subject to further appeal.

Article IV—Discharge

SECTION 1. Discipline.—The Company shall have the right to discharge, suspend, or discipline any employees for cause or violation of any of the Company's posted rulings or regulations. Any employee discharged, suspended, or otherwise disciplined who feels that he has been unjustly dealt with by the Company's rep-
431 resentatives or agents shall have recourse through the grievance procedure provided in Article III of this agreement. If an employee, after investigation, is found to have been unjustly discharged, or suspended, he shall be reinstated without loss of seniority and paid for time lost less any wages received from other employment during such period of lost time.

If a discharged, or suspended employee fails to present his discharge or suspension as a grievance by the end of the second full working day after his discharge or suspension, such discharge or suspension shall be considered as final, and no grievance based thereon shall be considered.

ARTICLE V—GENERAL WORKING CONDITIONS

SECTION 1. Work Stoppage.—The Union agrees that there shall be no strikes, stoppages, or boycotts during the life of this agreement.

SECTION 2. Lock-out.—The Company agrees that there shall be no lock-out or discrimination during the life of this agreement.

SECTION 3. Uniforms and Equipment.—The Company agrees to furnish all uniforms and equipment to the employees coming under the provisions of this Agreement, and further agrees to replace any badly worn uniforms, overcoats, raincoats, and hats, and any other equipment necessary to carry out the duties assigned to them, provided the employee does not abuse this equipment by improper care, or by wearing same off duty.

SECTION 4. Personal Appearance.—Guards reporting for duty shall be neat in appearance, clean shaven, and in the uniform furnished for the season. Any guard violating this Section shall be subject to one day's suspension.

432 SECTION 6. Bulletin Boards.—The Company shall provide a reasonable number of bulletin boards on which the Union may post notices of its recreational and social affairs and of Union elections and results thereof, appointments, and meetings. All such notices must be approved by the Company before being posted, and shall be countersigned by the officer of the Union. The Union shall promptly advise the Company of the officers who have the power to countersign such notices and shall provide it with their specimen signatures. There shall be no other distribution or posting by the Union or employees on the Company's property of pamphlets, advertising of political matter, notices, or any kind of literature other than herein provided.

SECTION 7. No Age Limit.—So long as an employee is capable of performing his work, age shall not be a disqualifying factor either in hiring of new help or the continued employment of employees; provided, however, that the Company shall not be compelled to retain in its service any employee who is not qualified to perform his duties.

SECTION 8. Safety Committee.—The Union shall be represented by at least one member on the Safety Committee.

Article VI—Seniority

SECTION 1. Definition.—Rights to promotion, preference to shifts, and the right to remain in the service of the Company in case of reduction in force shall be governed by seniority subject to the provisions of this Agreement.

SECTION 2. Seniority Date.—An employee's seniority shall begin on the date he enters the employ of the Company in the Unit, but he shall not be placed on the Seniority List and shall not enjoy the rights enumerated in Section 1 of this Article until he completes the probationary period as provided for in Section 3 of this Article.

433 SECTION 3. Probationary Period.—All new employees shall be considered as on probation for a period of sixty (60) working days after their date of hiring, and there shall be no responsibility on the part of the Company for reemployment of probationary employees if they are laid off or discharged during this period.

SECTION 4. Lay-offs.—In the event of the reduction in force, the last employee hired shall be the first to be laid off. When necessary to increase the force after a lay-off, the last employee laid off shall be the first to be returned to service.

SECTION 5. Recall to Work.—When it becomes necessary to lay off employees as much notice as possible will be given, but in any event such notice of lay-off shall be not less than twenty four (24) hours. When calling employees to return to work after a lay-off, the Company will ordinarily use Registered Mail, but in an emergency, the Company may notify some, or all, employees by phone, or in person, to return to work. Any employee who fails to return to work or get in touch with the Company within five (5) business days after the day his notice is mailed will be conclusively presumed to have resigned and his record shall be noted accordingly.

SECTION 6. Change of Address.—Laid off employees shall keep the Company and the Union advised of any change of address. The Company is entitled to rely on the address furnished by the employees for all purposes within the meaning of this Agreement.

Article VII—Management of Plant

The management of the Plant and the direction of the working forces, including the right to hire, suspend, or discharge, for proper cause, or transfer, and the right to relieve employees from duty because of lack of work or for other legitimate reasons is vested exclusively in the Company; provided, that this will not be used for purposes of discrimination against any member of the Union.

434

Article VIII—War Department Regulations

It is understood that for the duration of the war this Agreement is in all respects subject to the provisions of the Directives of the War Department concerning Military Organizations of the Plant Guard Forces (WD Directive, July 2, 1942, Ag 231.43; SOS Circular —, 1942; and any amendments thereto), and that nothing contained in this Agreement shall be construed in any way to interfere with the organization, efficiency, training, and control by the War Department of the Company Guard Force as an Auxiliary to the Military Police, nor to abrogate or interfere with the duties, responsibilities, and rights imposed by the War Department upon any employee in such Auxiliary Military Police.

Article IX—Leave of Absence

SECTION 1. Requested Leave.—Leave of absence may be granted to an employee for reasons such as: Jury duty, attending convention, or voluntary military duty in defense of the United States and for other valid reasons. Request for leaves of absence must be made to the Director of Plant Protection in writing and each

case will be decided on its merits. The employee shall not lose his seniority during such leaves of absence. An employee laying off from work without notice, or just cause may be subject to loss of seniority.

SECTION 2. Military Leave.—Any employee called to compulsory military duty shall retain his seniority and the Company shall reinstate such employee within forty (40) days after his return; provided, however, that he pass the physical examination as given on entering the service of the Company, and if a layoff period is in effect which would have included such employee had he been working, it shall be effective as to him.

SECTION 3. Failure to Return.—Employees not returning upon the expiration of their leave shall be considered to have quit voluntarily.

435 SECTION 4. Records.—The Bargaining Committee shall be supplied monthly with copies of the names of all employees on leave of absence for more than a week.

Article X—Duration

SECTION 1. Time of Expiration.—This Agreement shall remain in force for one (1) year from the date hereof, and shall automatically renew itself from year to year unless written notice of desire to terminate or to modify any portion or any of the terms hereof is given, by either party to the other at least thirty (30) days prior to the expiration of any such annual period.

Amendments may be made from time to time by mutual agreement.

SECTION 2. Effective Date.—This Agreement shall be effective at once, except that part which is subject to War Labor Board approval. The Company and the Union will jointly apply to the War Labor Board for their approval from the date of signing.

SECTION 3. Supplements.—There is attached hereto and made a part hereof Supplement No. 1, governing hours of work, and Supplement No. 2, governing wage rates. Because of present economic conditions it is agreed that Supplements Nos. 1 and 2 may be revised or amended by agreement between the Company and the Union on three (3) days' notice from either party and without disturbing any of the other Articles of this Agreement.

Article XI—Vacations

SECTION 1. Eligibility.—Employees who have one (1) year or more of continuous service in the Unit shall be entitled to a vacation of one (1) week.

SECTION 2. Vacation Pay.—Employees entitled to a vacation under Section 1, of this Article, shall be paid forty (40) hours at the hourly rate received the last pay period in June of each year. Vacation pay checks shall be delivered to the employee before his vacation starts.

436 SECTION 3. Vacation Period.—All vacations shall be taken between July 15, and September 30, of each year, and must be arranged for in advance with the Director of Plant Protection.

SECTION 4. Foregoing Vacations.—Any employee who is entitled to a vacation and, on request of the Company, does not take it shall be paid his vacation pay in addition to earnings on the job.

In witness whereof, the parties hereto have executed this agreement as of this date, ---------- 194 ---.

For the Employees International Association of Machinists, District #90, Local Lodge #1683.

For E. C. Atkins Company.

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President.

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Negotiating Committee.

437 SUPPLEMENT No. 1

HOURS

SECTION 1. The work week shall consist of seven consecutive days beginning on Monday of each week. The work day shall be the calendar day from midnight to midnight. Each employee shall have a designated time at which his work day commences.

SECTION 2. The first forty (40) hours of work in any work week, not exceeding eight (8) hours in any one day, shall be paid for at the regular rate. Work in excess of forty (40) hours in any work week, or in excess of eight (8) hours in any one day, shall be paid for at one and one half times the regular rate.

SECTION 3. Subject to the provisions of Executive Order #9240 and of Section 2, of this Supplement, when an employee works six (6) consecutive days in a work week, time and one-half shall be allowed for time worked on the sixth (6th) consecutive work day in any work week; also time and one-half shall be allowed for time worked on New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day.

SECTION 4. Subject to the provisions of Executive Order #9240, when an employee works seven (7) consecutive days, double time shall be allowed for all work done on the seventh (7th) consecutive work day in any work week.

SECTION 5. Each shift worked will be counted as of the work day in which the shift began. For example, a shift works from 11:00 P. M., Monday until 7:00 A. M. Tuesday, would be counted as of Monday.

SECTION 6. When a holiday is not observed, that is when shifts operate as usual on a holiday, time and one-half will be paid only for the shift that begins on the holiday.

SECTION 7. No employee shall be laid off during the regular work day or work week without pay for the purpose of avoiding overtime payment.

SECTION 8. The Company reserves the right to change shift hours within the limitations of Executive Order #9240, however, before any change is made in shift hours, either in the number of hours worked per week, or the starting time of shifts, the Bargaining Committees shall be advised in advance and given an opportunity to present objections which will be given consideration before any such change shall become effective.

438 SUPPLEMENT No. 2

WAGES

Wages for all employees alike coming under the provisions of this agreement shall be as follows:

Hiring rate	$0.75 per hour
After 30 days	.80 per hour
After 90 days	.90 per hour
After 6 months	1.00 per hour

None of the provisions of Supplement No. 2 shall be effective until approved by the National War Labor Board and when so approved they shall become effective as of the beginning of the work week which commenced on _____, 194 __, unless some other effective date is prescribed by the National War Labor Board.

339 *Board's Exhibit 103*

E. C. ATKINS AND COMPANY

402 South Illinois St.

INDIANAPOLIS 9, IND., U. S. A.

DECEMBER 20, 1943.

INTERNATIONAL ASSOCIATION OF MACHINISTS,
District #90, Local 1683,
49½ South Delaware Street, Indianapolis, Indiana.

Attention: Mr. F. M. Richardson, Business Representative.

DEAR SIR: This will acknowledge receipt of the proposed form of contract to be entered into between the International Associa-

tion of Machinists, District #90, and its affiliated local lodge #1683, and the E. C. Atkins and Company.

You have doubtless been advised of the position heretofore taken by our Company that the auxiliary military police which you represent are in no sense employees of our Company and that consequently we have no obligation under federal or state law to bargain with you as their representative.

Under the circumstances may we suggest that you take such other action as you see fit to establish our obligation to bargain with you respecting such auxiliary military police.

Yours truly,

E. C. ATKINS AND COMPANY,
(S) Cyrus E. Wood,
CYRUS E. WOOD,
Personnel Director.

CEW:as.

440

Board's Exhibit 104

BARNES, HICKAM, PANTZER & BOYD

Attorneys at Law

INDIANAPOLIS 4, INDIANA

DECEMBER 22, 1943.

E. C. Atkins and Company—Case No. 9-R-1200

Mr. JOHN GETREU,
National Labor Relations Board,
Architects Building, Indianapolis, Indiana.

DEAR MR. GETREU: This will follow up our telephone conversation of today, in which you advised that International Association of Machinists, District 90 and their Affiliate, Local 1683, filed a charge of unfair labor practice against my client, E. C. Atkins and Company, for refusal to bargain, and asked me to state the position of my client.

I think the position is well stated in the letter which E. C. Atkins and Company wrote the Union when it was requested to bargain, which letter you said you had already read.

The reasons supporting the position stated in the letter are best set forth in the two briefs which our firm prepared and filed in behalf of E. C. Atkins and Company with the National Labor Relations Board. I enclose copies of each. You will note we asked for oral argument, which we were never accorded. Furthermore, the Board in its Decision completely disregarded the absolutely undisputed evidence by failing to find any of the facts favorable to our contentions. In addition, the Board depended chiefly upon cases relating to facts which antedated the military

orders, which constituted the main basis of our case. Under the circumstances, we feel we are entitled to a review of the entire situation by a court that will at least grant us a hearing upon the facts.

You understand, of course, that in the position taken by E. C. Atkins and Company, there is no personal animosity toward you or the Regional Office at Cincinnati, and that the feelings of the executives of E. C. Atkins and Company and myself are, of course, most friendly toward Mr. Richardson, the Union organizer.

I am, with kind regards,

Sincerely yours,

(S) KURT PANTZER.

KFP/TB.
Encls.

442 *Board's Exhibit 105*

Before the National Labor Relations Board for the Ninth Region

Case No. 9-R-1200

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90 AND ITS AFFILIATE, LOCAL 1683, PETITIONER.

BRIEF OF E. C. ATKINS AND COMPANY

PRELIMINARY STATEMENT

Under date of September 10, 1943, International Association of Machinists, District 90 and its affiliate, Local 1683, hereinafter sometimes referred to as I. A. M., filed its Petition for Investigation and Certification of Representatives of the plant guards of E. C. Atkins and Company at its two Indianapolis, Indiana, plants with the National Labor Relations Board for the Ninth Region at Cincinnati, Ohio (Exh. Board 1-A, Tr. 5). A Notice of Hearing was thereupon issued by Rosemary S. Macke, Acting Regional Director (Exh. Board 1-A, Tr. 5), and a hearing was held at Indianapolis, Indiana, on September 24, 1943, before Trial Examiner Shroyer.

443 At the beginning of the hearing E. C. Atkins and Company, hereinafter sometimes referred to as the Company, moved to dismiss the Petition on the ground that the Company is not an "employer" and the plant guards are not "employees" of the Company under the definitions of those terms in the National Labor Relations Act (Tr. 6). This motion is reprinted in full in the appendix, infra, pages 21-22. The Trial Examiner referred this motion to dismiss to the Board for ruling (Tr. 7).

During the course of the hearing the Company also applied for a subpoena duces tecum directed at F. M. Richardson to produce

certain union records alleged to contain evidence in support of the Company's contention that the Petition should be dismissed (Exh. Company 1, Tr. 11). This application for a subpoena duces tecum appears in the appendix, infra, pages 23–25. The Trial Examiner granted the application with respect to the charter, constitution, and by-laws of the I. A. M. (Tr. 11), but denied the application insofar as it related to the minute book, membership roll, application cards, membership cards, dues book, bank book, check book, cancelled checks, correspondence and other records relating to the purposes, activities and membership of the I. A. M. (Tr. 14). The Company contends that these union records contain evidence that is relevant to material issues in this proceeding and that the Trial Examiner erred in denying its application for a subpoena duces tecum.

This brief is filed on behalf of E. C. Atkins and Company, pursuant to Section 203.9 of the Rules and Regulations of the National Labor Relations Board. The time for filing this brief was extended by telegram to October 11, 1943.

444

THE PARTIES

(1) The Company.—E. C. Atkins and Company is a corporation organized and existing under the laws of the State of Indiana, with two plants in Indianapolis, Indiana. The main plant in Indianapolis, which occupies two entire city blocks and is bounded on the north by South Street, on the west by Capitol Avenue, on the east by Illinois Street, and on the south by Merrill Street, has been in operation since 1857. The Federal Government owns the new armor plate plant employed by the Company in war production at the southeast corner of Twenty-First Street and Northwestern Avenue (Tr. 8).

The Company is engaged in the business of manufacturing and selling saws, tools, and armor-plate. Approximately eighty per cent of the raw materials (consisting principally of steel, castings, and lumber) used in the business of the Company is purchased and shipped in interstate commerce from sources outside the State of Indiana, and approximately eighty per cent of the finished products produced by the Company is sold in interstate commerce to purchasers outside the State of Indiana. During the calendar year 1942, the raw materials used by the Company exceeded $500,000 in value and the gross sales price of its finished products was over $1,000,000. The finished product of the Company is disposed of to the United States Government, jobbers, dealers, subcontractors and direct to manufacturing consumers. During the calendar year 1942 to the date of this hearing, the manufacturing and selling operations of the Company have continued substantially along the same lines as those set forth above for the year 1942 (Tr. 9, 10). The Company admits that it is engaged in interstate commerce within the mean-

445

ing of that term in the National Labor Relations Act (Tr. 10).

(2) I. A. M.—The International Association of Machinists, unaffiliated, is an international union admitting workers in a machine or metal industry to membership (Exh. Petitioner 1, Tr. 44). Local 1683, the particular unit involved in this proceeding, admits to membership employes of concerns other than the Company (Tr. 37, 45) but all of the members of Local 1683 are employed as plant guards (Tr. 41). There is nothing in its constitution or by-laws that authorizes it to organize plant guards (Tr. 46). On August 18, 1943, an I. A. M. representative wrote a letter requesting recognition of that union as the bargaining agent for the plant guards (Exh. Board 3, Tr. 15); the Company did not reply to the letter (Tr. 15) and still declines to recognize the union (Tr. 16). The I. A. M. is the Petitioner for Investigation and Certification of Representatives in this case.

FACTS

The Company employs approximately 1,267 regular employes, of which 1,208 are members of the C. I. O. Union and 59 are members of the Saw Smiths' Local Union (Tr. 82, 83), and it has entered into contracts with both these unions (Exhs. Company 17, 18, 19, 20, Tr. 85, 88). The representation of these employes is not involved in this proceeding. Prior to the time the Company became engaged in war production, it employed from four to six night watchmen (Tr. 88) but it is now required because of
446 its government contracts to pay the salaries of over sixty auxiliary military police or plant guards (Tr. 76, 83, 88–90).

The representation of these plant guards is the subject of controversy in this case. The Company contends that these plant guards are not its employes but are under the control of the United States Army and are therefore employes of the federal government. This point is made clear by the contrast between the status of the Company's regular employes and the auxiliary military police in question which the testimony at the hearing disclosed.

Duties of Plant Guards

The general duties of auxiliary military police are set forth in a letter issued June 7, 1943, by the Continuous Security District Office of the War Department at Cincinnati, Ohio, and signed by Lieutenant Colonel A. C. Rasmussen (Exh. Company 4, Tr. 35). It states on page 2:

"The mission of a guard force of Auxiliary Military Police is:

"a. To provide interior and exterior protection of the plant against sabotage and espionage and natural hazards.

"b. To serve with the Army in providing the protection to the plant and its environs in emergency situations."

Specifically their duties include directing traffic, escorting visitors, watching the gates and entrances, transporting cash within the

plant, observing productions workers and other activities designed to prevent interruption of production (Tr. 21).

447 The nature of these duties requires that plant guards work under conditions that are very different from those of any of the company's regular employes. They wear uniforms (Tr. 20), carry guns (Tr. 20), and salute army officers (Tr. 64), and they have the right to arrest anyone in the plant (Tr. 22, 30, 31, 74). The company issues identification cards to its production employes, officers, directors and other agents (Exh. Company 21, Tr. 94), and requires them to wear identification badges (Tr. 94). In contrast the plant guards carry identification cards issued by the War Department (Exh. Company 3, Tr. 27), and wear arm bands on which are written the words "Auxiliary Military Police" (Tr. 65). Ordinary employes have to have special passes to enter the armor plate division from outside the plant (Exh. Company 14, Tr. 65), to enter the armor plate division from inside the plant (Exh. Company 15, Tr. 66), or to go in and out of the plant grounds during working hours (Exh. Company 16, Tr. 66), but plant guards are not subject to such regulations. The Company does not give any military instruction to its production employes (Tr. 92), but army officers train the plant guards (Tr. 30). The instruction given the auxiliary military police each week consists of lessons in the use of clubs and fists, pistol marksmanship, military courtesy, methods of arrest, control and prevention of fires and similar topics (Tr. 71), and is under the supervision of Lieutenant Scanlon of United States Army (Tr. 30). These facts show the great dissimilarity between the duties of a plant guard and the job of an ordinary production employe.

448 Hiring of Plant Guards

Persons seeking to become auxiliary military police apply at the personnel office of the Company and fill out a regular "Application for Employment" (Exh. Company 5, Tr. 24, 50). A representative of the Company interviews the applicant and submits his name to the military authorities at Cincinnati if he is satisfactory (Tr. 95). However, the army officers make the decision as to whether the applicant will be hired after they have made an independent investigation as to his capacity, integrity and patriotism (Tr. 51, 95). The letter issued June 7, 1943, by the Continuous Security District Office of the War Department at Cincinnati and referred to above clearly states:

"A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto" (Exh. Company 4, Tr. 35).

Applicants who are approved must take an oath to support the Constitution of the United States and the authorized military authorities (Tr. 20, 27, 50), and must sign an "Agreement between the United States of America and ———— Plant Guard" on the form prescribed by the government (Exh. Company 2, Tr. 25). If the plant guard refuses to sign this agreement, his employment will be terminated (Exh. Company 4, 35, 54). Finally, the army issues a "Certificate of Enrollment" signed for the Commanding General, Fifth Service Command, by Lieutenant Colonel Rasmussen (Exh. Company 6, Tr. 55).

449 Supervision and Control of Plant Guards

The supervision of plant guard forces in this area has been provided for as follows:

"The Commanding General of the Fifth Service Command has designated the Chiefs of the Continuous Security Districts as the Commanding Officers in their various districts. * * * They then appoint District Plant Guard Officers, who are in direct charge of plant guard forces of such plants in their districts." (Letter issued June 7, 1943, by the Continuous Security District Office of the War Department at Cincinnati, Ohio; Exh. Company 4, Tr. 35.)

Lieutenant Colonel A. C. Rasmussen is District Chief (Exh. Company 4) and Captain B. R. Wetenhall is District Plant Guard Officer for the Cincinnati area (Exh. Company 8). The auxiliary military police at each of the Company's plants are under the direction of a Chief, who has four lieutenants to assist him (Tr. 51).

At present the work of the plant guards is controlled by three General Orders issued by Captain Wetenhall in May of this year (Exhs. Company 10, 11, 12, Tr. 62). The nature of the control which the army maintains over the auxiliary military police is clearly indicated by the following paragraphs from General Order No. 1 (Exh. Company 10):

"Pursuant to the orders of the War Department, the guard forces at this plant were activated as Auxiliary Military Police, and for military purposes will be commanded, drilled, and instructed as military units.

450 "All members of the guard force are subject to the Articles of War and may be court-martialed or otherwise punished for violations thereof.

"A commissioned officer of the Army of the United States has been placed in command. Although in command at all times, this officer has not superseded the civilian guard officers and normally will exercise direct control only in matters relating to military instruction and duties as Auxiliary Military Police.

"The mission of this guard force is to provide protection for this plant. In addition to its normal functions, the force or any mem-

ber thereof, whether on or off duty, is available for military use in any emergency, whether it be the result of flood, fire, or other disaster; internal disorders hazardous to the plant property or its production; or enemy action of any nature. No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission."

Within each individual plant the Chief supervises the work of the plant guards. He determines whether the men will automatically trade shifts or will always work the same hours (Tr. 70); he promotes men without reference to seniority (Tr. 67, 77) and the men have no recourse from his disciplinary action (Tr. 67). Although the Chief and the men make every effort to co-operate with the plant management (Tr. 64), they are not subject to the orders of the Company's officers (Tr. 69, 73, 90); it is understood throughout the plant that the auxiliary military police are under the military authorities and are not responsible to the foremen or other Company employes (Tr. 91). The Chief in turn re-
451 ceives his instructions from Captain Wetenhall, the District Plant Guard Officer (Tr. 59, 63), and he frequently carries on correspondence with Captain Wetenhall concerning the problems that arise in connection with his work (Tr. 79).

Discharge of Plant Guards

General Order No. 1 issued by Captain Wetenhall and referred to above provides as follows with respect to the discharge of plant guards:

"No member of the Auxiliary Military Police may resign without the written approval of the District Plant Guard Officer" (Exh. Company 10).

A plant guard may be relieved of his duty temporarily by the Chief of the plant unit or the Company, but neither has the authority to discharge him permanently (Tr. 58). Upon termination of a plant guard's employment the army awards him a "Certificate of Meritorious Conduct" (Exh. Company 7, Tr. 57) unless he is discharged for misconduct, absence without leave, drunkenness or for some military reason, in which event only a formal release from his agreement with the United States Government is issued (Exh. Company 8, Tr. 58).

The above analysis of the record has demonstrated that the duties of the auxiliary military police are of an extremely different nature from those of ordinary production employes and that as a result the hiring, supervision, control and discharge of such employes is handled by the regular military authorities, who are obviously better qualified to direct plant protection activities than the plant management.

452 QUESTIONS PRESENTED

I. Does the relationship of employer and employee exist between auxiliary military police engaged in guarding a defense plant and the company that operates the plant.

II. Is it a denial of due process under the Federal Constitution for the National Labor Relations Board to refuse to issue a subpoena duces tecum for union records at the request of an employer when the union records contain relevant evidence regarding material issues in a representation case.

453 ARGUMENT

I. The relationship of employer and employee does not exist between the auxiliary military police and E. C. Atkins and Company under the definition of "employer" in Section 2 (2) and "employee" in Section 2 (3) of the National Labor Relations Act.

The protection of defense plants against sabotage and espionage requires employees with skills that are of a very different nature than those of ordinary production employees. As a result the training and supervision of auxiliary military police has been taken over to a large degree by the Army of the United States. The question is therefore presented whether a company operating a defense plant has relinquished so much of its control over its plant guards to the Army that the relationship of employer and employee no longer exists within the definition of those terms in the National Labor Relations Act (29 U. S. C. A. § 152).[1] In this proceeding it is the contention of the Company that since the hiring, training, supervision and discharge of auxiliary military police depends upon the decisions of Army officers, the Company no longer controls them and is not their employer. If this is the case, the Petition for Investigation and Certification
454 of Representatives should be dismissed, since it is obvious that the Federal Government, the other possible employer involved, is not included within the definition in the Act.

The problem of determining whether the employer-employee relationship exists in a particular situation has also arisen in connection with the Fair Labor Standards Act, which defines the term employee in a similar manner (29 U. S. C. A. § 203).[2]

In Bowman v. Pace Co., 119 F. (2d) 858 (C. C. A. 5, 1941), the court decided that a watchman was not an employee of the wholesale grocery company whose premises he guarded, although he was under the direction of the company to some extent, because

[1] SEC. 2. When used in this Act—
(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States or any State or political subdivision thereof * * *.
(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer unless the Act explicitly states otherwise. * * *."

[2] SEC. 3. As used in this Act—
(e) "Employee" includes any individual employed by an employer.

he was hired and paid by a third person and his discharge was the third person's affair. Likewise in Williams v. United States, 126 F. (2d) 129 (C. C. A. 7, 1942), the court emphasized the factors of direction, hiring, payment and discharge mentioned in the Bowman case and held that no relation of "employer and employee" existed for purposes of the federal social security tax. The court said:

"* * * There seems to be no dispute but that the employer-employee relationship exists only where the person, for whom the work is done, has the right to control and direct the work, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. Singer Mfg. Co. v. Rahn, 132 U. S. 518, 10 S. Ct. 175, 33 L. Ed. 440; Jones v. Goodson, 10 Cir., 121 F. 2d. 176, 179."

455 "We have already concluded, not inconsistent with the findings of the court below, that the establishments had no right to hire or discharge the members of the orchestra. To our mind, this circumstance alone comes near being decisive. It is difficult to conceive of any employer-employee relationship without such a right on the part of the employer."

In Texas Co. v. Higgins (C. C. A. 2, 1941), 118 F. 2d 636, Judge Learned Hand adopted the same position:

"Were the question presented to us for the first time, we should have no doubt that Thomas and his assistants were not 'employees' of the plaintiff; the Act appears to take over the term as the common law knew it, and at common law they would not be employees. The regulation is in harmony with this assumption, for it enumerates the generally accredited determinants in such cases, of which the most important is the putative employer's control over the employee's business."

The Indiana courts have likewise attached importance to the right of control in deciding whether the relationship of employer and employee is present. In Mid-Continent Petroleum Corporation v. Vicars, 47 N. E. (2d) 972 (Indiana Supreme Court, 1943), the question was whether an injured workman was the employee of the lessor or the employee of the lessee of an oil station. The court held that the plaintiff was not the employee of defendant lessor and quoted with approval the following language from Marion Shoe Co. v. Eppley, 181 Ind. 219, 104 N. E. 65 (1914):

"The real test is: was appellee, at the time he sustained
456 his injury, under the power and control of appellant and subject to its orders and directions in the doing of the work at hand."

The above cases indicate that at least four factors must be considered in determining whether an employer-employee relationship exists. First, who hires the worker? Although applicants are interviewed at the E. C. Atkins and Company plant, the military authorities in Cincinnati make the final decision (Tr. 51, 95).

Second, who supervises their work? In the instant case the Chief in the plant unit directs the men (Tr. 67, 70, 77) and he is responsible to the Army officers (Tr. 59, 63, 79). Third, who discharges the guards? The Company and the Chief in the plant unit may suspend a member of the auxiliary military police but the military authorities actually discharge him (Tr. 58, Exh. Company 10). Fourth, who pays the men? The Company pays the plant guards (Tr. 23). It is submitted that the first three criteria (hiring, supervision, and discharge) clearly show that the federal government is the employer of the auxiliary military police and that these three factors overbalance any inference based on the method of payment that the Company employs the men.

The question concerning the existence of an employer-employee relationship has not been squarely presented in any previous case before the National Labor Relations Board. In the Matter of Budd Wheel Company, Case No. R-5787 (September 17, 1943), the Board reviewed the prior cases and decided that the plant protection force there involved was an appropriate unit for purposes of collective bargaining. However, the Board found that the "Company still hires and discharges the guards" and
457 the situation is thus entirely different from that presented in this proceeding. Here the record clearly shows that the ultimate right to hire and fire rests with the army officers, *supra*, pp. 7 and 10, so that the Budd Wheel case is not applicable.

Another recent case involving plant guards is In the Matter of Dravo Corporation, Case No. R-5570 (August 30, 1943). The only reference in the opinion of the Board to the character of the relationship between the guards and the Company is the statement that "the wages and duties of this group of personnel remained unchanged after their induction so that it is apparent that the proximate relationship of employer and employee still exists between the Company and the guards." In the instant case Mr. Cyrus E. Wood, personnel director for the Company, pointed out that whereas the Company formerly employed six night watchmen it now pays over sixty auxiliary military police because of its war production (Tr. 88). The hiring, direction and firing of these new plant guards is no longer within the control of the company, supra, pp. 7–10, and it cannot reasonably be said that there has been no substantial change in this job as a result of the supervision of the military authorities.

The earlier decisions of the Board are all based on the fact that after the militarization of the plant guards the Company still had the right to discipline them, or to discharge them for cause, or to hire new guards. Matter of Bethlehem Steel Company, 46 N. L. R. B. 794 (January 6, 1943); Matter of Johns-Manville Products Corporation, 45 N. L. R. B. 33 (October 22, 1942 Matter of Campbell Soup Company, 45 N. L. R. B. 6 (October 22, 1942); Matter of Chrysler Corporation, Highland Park Plant,

458 44 N. L. R. B. 881 (October 2, 1942). At the plant of E. C. Atkins and Company the Chief of the auxiliary military police disciplines the men (Tr. 67) and he is not subject to any direction by the Company (Tr. 69, 73, 90); the Company can only relieve a guard from duty temporarily (Tr. 58), and all discharges require the written approval of the District Plant Guard Officer, Captain Wetenhall (Exh. Company 10); army officers make the final decision with respect to the hiring of applicants for the job of auxiliary military police (Tr. 51, 95, Exh. Company 4). The previous decisions of the Board are therefore not in point. Since the federal government and not the army employs the plant guards, the Petition for Investigation and Certification of Representatives should be dismissed.

Finally, the purpose of the auxiliary military police is to prevent interruptions of production (Tr. 73). General Order No. 1 (Exh. Company 10) issued by Captain Wetenhall, specifically states that no conflicting interest of any kind will be permitted to interfere with the successful accomplishment of the guards' mission. Yet by its very nature unionization and collective bargaining between the representatives of the auxiliary military police and the Company may produce situations incompatible with efficient supervision of the work by the military authorities. A strike resulted at the Johnsonville, Pennsylvania plant of the Brewster Aeronautical Corporation because the union protested the assignment of guards to duty without regard to seniority rights (War Labor Board decision of September 25, 1942), and another recent War Labor Board case followed the demands of the union leaders of plant guards for a union maintenance contract at
459 a war plant. (In re Virginia Rubatex Division, Great American Industries, Case No. 111–476–R, August 27, 1943). Similar union demands at the E. C. Atkins and Company plant would interfere with the broad control which the military authorities now exercise over the hiring, supervision, and discharge of auxiliary military police.

II. The Trial Examiner erred in denying the Company's application for a subpoena duces tecum directed at the union leader to produce the minute book, membership roll, application cards, membership cards, correspondence and other records relating to the purposes, activities, and membership of I. A. M.

The chief obstacle to unionization of the plant guards involved in this case is the broad control which the military authorities possess over their activities. It is the contention of the Company that the demands of the union may conflict with the mission of the auxiliary military police in such a manner that production will be interrupted. In this connection the activities of this union in the other defense plants in which it has members (Tr. 37, 45) is material evidence, but the Company was prevented from introducing such evidence by the refusal of the Trial Examiner

to grant its application for a subpoena duces tecum (Tr. 14). The record does not show whether the union has or has not demanded seniority rights, maintenance of membership contracts, and other privileges which interfere with the protection of the defense plants. Likewise the records of I. A. M. contain the purposes for which Local 1683 is organized and if they are sufficiently definite,
460 they might show that it is attempting to organize employes of the United States, which is expressly prohibited by the National Labor Relations Act.

It is a well established principle of administrative law that the right to a full hearing implies the privilege of introducing all evidence which is competent, material, and relevant to the issues and argument. Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 59 S. Ct. 206 (1938); Interstate Commerce Commission v. Chicago R. I. P. Ry. Co., 218 U. S. 88, 30 S. Ct. 651 (1909); Ohio Bell Telephone Company v. Public Utility Commission, 301 U. S. 292, 57 S. Ct. 724 (1936); National Labor Relations Board v. Indiana and Michigan Company, U. S. Supreme Court, January 19, 1943. Refusal of an agency to issue subpoenas to a party to an administrative proceeding is merely one method of preventing him from introducing competent evidence. The refusal of the Trial Examiner to issue the subpoena requested by the Company, therefore, deprived the Company of a fair hearing and constituted a denial of due process under the Federal Constitution.

The Trial Examiner also admitted in evidence over the objection of the Company a "Statement of Field Examiner Concerning Claims of Authorization for the Purpose of Representation" dated September 1, 1943 (Exh. Board 4, Tr. 18). This is an important piece of evidence inasmuch as the Petition for Investigation and Certification of Representatives filed by I. A. M. should be dismissed if the I. A. M. does not have a substantial number of members in the plant. The Company, however, was not permitted to cross-examine the individual who made the statement or the data on which it was based.

461 The material upon which an agency or other party proposes to rely as established fact, including the data upon which it is based, should be open for inspection by interested parties. The United States Supreme Court recognized this principle as early as 1912 when it said:

"* * * All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense." Interstate Commerce Commission v. Louisville and N. R. Co., 227 U. S. 88, 33 S. Ct. 185 (1913).

The failure of the Trial Examiner to sustain the Company's objection to this secret evidence was material error and deprived

the Company of a fair hearing. Crowell v. Benson, 285 U. S. 22, 52 S. Ct. 285 (1932).

CONCLUSION

The Petition of I. A. M. for Investigation and Certification of Representatives of auxiliary military police should be dismissed.

Respectfully submitted.

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Attorneys for E. C. Atkins and Company,
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KURT F. PANTZER,
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Of counsel.

462 APPENDIX

Before the National Labor Relations Board for the Ninth Region

Case No. 9–R–1200

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90 AND ITS AFFILIATE, LOCAL 1683, PETITIONER

MOTION OF E. C. ATKINS AND COMPANY TO DISMISS PETITION FOR CERTIFICATION

Comes now E. C. Atkins and Company, one of the parties to this proceeding (hereinafter referred to as the "Company"), and moves to dismiss the Petitioner's Petition for Investigation of Certification of Representatives herein for the following reasons:

1. E. C. Atkins and Company is not and cannot be an employer within the meaning of Section 2, Subsection 2, of the National Labor Relations Act with respect to auxiliary military police who wholly constitute the bargaining unit set forth in Item 4 of the Petition for Investigation.

463 2. The employes referred to in the petition for investigation can not come within the definition of the word "employes" under the provisions of Section 2, Subsection 3, of the National Labor Relations Act with respect to the alleged employer, E. C. Atkins and Company.

3. The relationship of employer and employee with its various interests has never set in and is not existing at this time with respect to the auxiliary military police referred to in the Petition for Investigation and E. C. Atkins and Company.

Wherefore, E. C. Atkins and Company respectfully prays that the Petitioner's Petition for Investigation and Certification of Representatives be dismissed.

E. C. ATKINS AND COMPANY,
By KURT F. PANTZER, *Attorney.*

464 United States of America

Before the National Labor Relations Board, Ninth Region

Case No. 9–R–1200

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90 AND THEIR AFFILIATE, LOCAL 1683, PETITIONER

APPLICATION FOR SUBPOENA DUCES TECUM DIRECTED AT F. M. RICHARDSON TO PRODUCE UNION RECORDS

Comes now E. C. Atkins and Company, one of the parties to this proceeding, and respectfully applies for a subpoena duces tecum directed at F. M. Richardson, Business Representative, International Association of Machinists, District 90, and their affiliate, Local 1683 (hereinafter referred to as the "Union"), one of the parties to this proceeding, to produce the following documents:

1. Charter, Constitution and By-Laws of the Union;

465 2. Minute book, membership roll, application cards, membership cards, dues books, bank book, check book, cancelled checks, correspondence, and other records relating to the purposes, activities, and membership of said Union;

in order that E. C. Atkins and Company may establish (a) the identity of the Union, within the purview of Section 2, subsection (5) of the National Labor Relations Act; (b) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana, plants, excluding sergeants, lieutenants, captains, and chief," are "employees" within the purview of Section 2, subsection (3) of the National Labor Relations Act; (c) whether "all plant guards employed by E. C. Atkins and Company, at its two Indianapolis, Indiana, plants, excluding sergeants, lieutenants, captains, and chief," have "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection," within the purview of Section 7 of the National Labor Relations Act; (d) whether it is an unfair labor practice for E. C. Atkins and Company "to refuse to bargain collectively with the representatives of "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana, plants, excluding sergeants, lieutenants, captains, and chief," within the purview of Section 8 subsection (5) of the National Labor Relations Act; and (e) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana, plants, excluding sergeants, lieuten-

466 ants, captains, and chief," can properly be found to be a "unit appropriate for the purposes of collective bargaining."

within the purview of Section 9, subsection (b) of the National Labor Relations Act.

E. C. ATKINS AND COMPANY,
By KURT F. PANTZER, *Attorney.*

467 *Respondent's Exhibit 101*

United States of America

Before the National Labor Relations Board, Ninth Region

Case No. 9–C–1982

IN THE MATTER OF E. C. ATKINS AND COMPANY *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90, AND THEIR LOCAL 1683, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR

APPLICATION FOR SUBPOENA DUCES TECUM DIRECTED AT F. M. RICHARDSON TO PRODUCE UNION RECORDS

Comes now E. C. Atkins and Company, one of the parties to this proceeding, and respectfully applies for a subpoena duces tecum directed at F. M. Richardson, Business Representative, International Association of Machinists, District 90, and their affiliate Local 1683 (hereinafter referred to as the "Union"), one of the parties to this proceeding, to produce the following documents:

1. Charter, Constitution and Bylaws of the Union;

2. Minute book, membership roll, application cards, membership cards, dues books, bank book, check book, cancelled checks, collective bargaining agreements executed by and between the Union with other plants in the Indianapolis area covering
468 the plant guards on duty at such plants, copies of grievances filed under such collective bargaining agreements, records of the hearings arising under the same, and decisions made with respect to such grievances by the Union and the respective employer, or the umpire, in the case; copies of seniority lists posted under such collective bargaining agreements; copies of orders affecting the wages, discipline, disputes, etc., arising in said various plants, as rendered by the National Labor Relations Board, the National War Labor Board, and the various trial examiners and subsidiary tribunals; correspondences; and other records relating to the purposes, activities and membership of said Union; in order that E. C. Atkins and Company may establish (a) the identity of the Union, within the purview of Section 2, subsection (5) of the National Labor Relations Act; (b) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," are "employees" within the purview of Section 2, subsection (3) of the National Labor Relations Act; (c) whether "all

plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," have "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other
469 mutual aid or protection," within the purview of Section 7 of the National Labor Relations Act; (d) whether it is an unfair labor practice for E. C. Atkins and Company "to refuse to bargain collectively with the representatives of all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," within the purview of Section 8, subsection (5) of the National Labor Relations Act; (e) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," can properly be found to be a "unit appropriate for the purposes of collective bargaining" with E. C. Atkins and Company, within the purview of Section 9, subsection (b) of the National Labor Relations Act; and (f) whether the provisions of the collective bargaining agreements, statements of grievance, seniority lists, and orders entered by the National Labor Relations Board and National War Labor Board, covering the units of "plant guards" subject to organization by the Union at other plants in the Indianapolis area do not contain provisions which are incompatible with the service of the auxiliary military police at the plants of E. C. Atkins and Company in the military service.

E. C. ATKINS AND COMPANY,
By KURT F. PANTZER, *Attorney.*

471 In the United States Circuit Court of Appeals for the Seventh Circuit

No. 8669—October Term, 1945, April Session, 1946

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

E. C. ATKINS AND COMPANY, RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board

Opinion

Filed May 31, 1946

Before SPARKS, MAJOR, and KERNER, Circuit Judges.

MAJOR, Circuit Judge. This matter is before us on motion of petitioner to enter a decree enforcing its order issued against

respondent on May 30, 1944. The same request was denied by this court on February 27, 1945. National Labor Relations Board *v.* E. C. Atkins and Company, 147 F. 2d 730. We see no reason to reiterate the facts involved, the questions presented, and the reasons for our refusal to enforce as they are fully disclosed in our opinion rendered at that time.

On June 4, 1945, the Supreme Court of the United States granted a writ of certiorari to review the aforesaid judgment of this court, vacated the judgment and remanded the case "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof on the Board's orders" (325 U. S. 838). On February 23, 1946, the parties entered into a stipulation as to the facts concerning such demilitarization, including the time and manner thereof as well as the present status of those thus demilitarized.

472 We formerly refused to enforce the Board's order on the ground that, since the alleged employees (plant guards) were militarized, they were not employees of respondent within the meaning of § 2 (3) of the National Labor Relations Act. Alternatively, we held that even if the guards, despite their militarized status, be considered employees of respondent, enforcement of the Board's order "should not be allowed * * * (because) to do so would be or is likely to be inimical to the public welfare."

We have considered the facts relative to the changed status of the plant guards by reason of their demilitarization and are of the opinion that they are irrelevant to the issues which we have heretofore decided adversely to the Board. Certainly such is the case with reference to our decision that the plant guards were not employees of respondent within the meaning of the Act. In fact, the irrelevancy of the changed circumstances as to this issue is conceded by the Board. We are urged by the Board, however, to reverse our former decision and to hold that the plant guards were employees. We have also given this matter further consideration and are of the opinion that our former decision in this respect was correct, and we reaffirm it.

Although we are doubtful that the facts concerning the demilitarization of the plant guards and their changed status as a result thereof are material to our alternative holding that the enforcement of the Board's order "would be or is likely to be inimical to the public welfare," there is no necessity for decision on our part in this respect. This is so for the reason that the latter issue is immaterial in view of our decision that the plant guards were not employees.

We therefore reinstate our former judgment in this matter for the reasons stated in our former opinion, and again deny the Board's motion for enforcement of its order.

473 In United States Circuit Court of Appeals

Before Hon. WILLIAM M. SPARKS, Circuit Judge; Hon. J. EARL MAJOR, Circuit Judge; Hon. OTTO KERNER, Circuit Judge.

8669

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

E. C. ATKINS AND COMPANY, RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board

Judgment

MAY 31, 1946.

This cause came on to be heard on the transcript of the record from the National Labor Relations Board and on Motion for enforcement of decree pursuant to mandate of the Supreme Court of the United States which remanded this cause to this Court for further consideration of alleged changed circumstances with respect to the demilitarization of the employees involved and the effect thereof on the Board's orders.

On consideration whereof, it is ordered and adjudged by this Court that the former judgment of this Court in this matter be reinstated for the reasons stated in our former opinion, filed February 27, 1945, and that the Board's motion for enforcement of its order be again denied.

474 (Clerk's certificate to foregoing transcript omitted in printing.)

475 (Clerk's certificate of transmittal omitted in printing.)

476 In the Supreme Court of the United States

Stipulation and addition to transcript of record

Filed Oct. 7, 1946

It is stipulated by and between the parties hereto that the documents described below, which were before the Circuit Court of Appeals for the Seventh Circuit in the above-entitled case, and which were inadvertently omitted from the transcript of record filed in this Court, should be added to the transcript of record for the consideration of this Court:

1. Petition for enforcement of an order of the N. L. R. B. filed bythe Board with the C. C. A. on or about August 24, 1944.

2. Charge filed by the International Association of Machinists with the N. L. R. B. on December 22, 1943.

3. Oral argument before the N. L. R. B. on May 11, 1944.

4. "Motion of Respondent to require petitioner to conform appendix and brief to the rules of this Court" filed with the C. C. A. Sept. 26, 1944.

5. Memorandum of N. L. R. B. in opposition to respondent's motion to require the Board to supplement its appendix and to strike certain portions of its brief filed with the C. C. A. on October 2, 1944.

6. Reply of respondent to answer memorandum of petitioner respecting motion of respondent to require petitioner to strike addendum and all references to addendum from petitioner's brief filed with the C. C. A. October 5, 1944.

477 7. Order of court overruling motion entered Oct. 9, 1944.

8. Opinion of C. C. A. in this case rendered Feb. 27, 1945.

9. Order of the C. C. A. in this case entered Feb. 27, 1945.

J. Howard McGrath,
J. Howard McGrath,
Solicitor General.

Dated September 27, 1946.

Frederic D. Anderson,
Counsel for Respondent.

Dated October 3, 1946.

479 [File endorsement omitted.]

Board's Exhibit 101–A

United States of America

Before the National Labor Relations Board, Ninth Region

Case No. 9–C–1982

In the Matter of E. C. Atkins and Company *and* International Association of Machinists, District 90, and Their Affiliate, Local 1683, Affiliated With the American Federation of Labor

Charge

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that E. C. Atkins and Company at Plant No. 1, 402 South Illinois Street, Plant No. 2, 21st and Northwestern, Indianapolis, Indiana, employing 56 workers in Guard Duty, has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (5) of said Act, in that on December 20, 1943, it, by letter through its officers and agents, refused to bargain collectively with the authorized representatives of the International Association of Machinists, District 90, and their affiliated, Local 1683, affiliated with the American Federation of Labor, a labor organization chosen by a majority of the plant guards at the company's two Indianapolis Plants, excluding the Chief and Lieutenants and all other

supervisory employees with authority to hire, promote, discharge, discipline and otherwise effect changes in the status of employees or effectively recommend such action, in an election held under the auspices of the National Labor Relations Board on November 17, 1943, for collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

By the act set forth in the paragraph above, it, by its officers and agents has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90 AND THEIR AFFILIATE LOCAL 1683, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR,
By Frank M. Richardson,
FRANK M. RICHARDSON,
Business Representative,
49½ South Delaware Street,
Indianapolis, Indiana. Ma. 8103.

Subscribed and sworn to before me this 22nd day of December 1943 at Indianapolis, Indiana.

/S/ John C. Getreu
JOHN C. GETREU,
Field Examiner, Ninth Region.

480 [Clerk's certificate to foregoing paper omitted in printing.]

483 Before the National Labor Relations Board

Case No. 9-C-1982

E. C. ATKINS AND COMPANY, *and* INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT 90, AND THEIR AFFILIATE LOCAL, 1683, AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR

Transcript of oral argument

815 CONNECTICUT AVE. NW.,
Washington, D. C., May 11, 1944.

The above-entitled matter came on for oral argument pursuant to notice at 10:30 a m.

Before Gerard Reilly, presiding; John M. Houston, member.

Appearances: Kurt F. Pantzer, 1313 Merchants Bank Building, Indianapolis, Indiana, appearing on behalf of the Company; L. O. Thomas, Machinists Building, Washington, D. C., appearing on behalf of the Union.

484 PROCEEDINGS

Mr. REILLY. The Board will now hear oral argument in the E. C. Atkins and Company case, file No. 9–C–1982. The case is here on Respondent's exceptions to the Trial Examiner's Report. Mr. Pantzer, are you representing the Respondent?

ORAL ARGUMENT OF MR. KURT F. PANTZER

Mr. PANTZER. If it please the Board, this case is here on exceptions filed to the Examiner's Report finding that the company is guilty of an unfair labor practice in failing to bargain with the Machinists Union who have been organized. The location in dispute in this case is therefore the Indianapolis location.

One of the plants is the South Illinois Street plant in which the company prior to the war manufactured principally saws. That plant is owned by the company. The other plant is the Fall Creek Ordnance plant, the land and buildings of which are owned by the government and then leased to the company in order to ensure production space for the manufacture of armor plate. The company has had pleasant relations with the unions representing its employes in the past, and we have, may it please the Board, repeatedly stated at the hearings, both in the representation case and the unfair labor practice case that we intend to have friendly relations with this union when, if, and as this rather technical point which we are raising, and on which I understand the
485 mind of the Board is foreclosed, has been finally decided.

Mr. Richardson, the organizer for the Machinists in Indianapolis, is a grand person and no better counsel for the organization could be found.

Mr. REILLY. We have before us the same question that was raised in the representation case with regard to this unit of guards, and is it your position that this case is distinguishable in any respect from the Grable case or the Yellow Truck & Motor Coach case or is it your position that those cases should be overruled?

Mr. PANTZER. Well, in the first place, may it please your Honor, we take the position that so far as the facts states in your opinions in the Grable case, the Phelps-Dodge case, the Aluminum case, and the Truck case are concerned you have not considered, so far as the opinion goes, the facts which are pregnant in this record. In addition we claim that those cases should be overruled.

Mr. REILLY. Yes.

Mr. PANTZER. Now, we do not have available in Indianapolis records in those cases and I have never had one of my assistants

come to Washington to examine them. I do not know whether they would be available for such an examination. Now, does that state our position clearly?

Mr. REILY. I notice in your brief you rely also in part upon the Court of Appeals decision in the Hearst Publications
485 case, you were aware that that decision was reversed recently by the Supreme Court?

Mr. PANTZER. Very much aware.

Mr. REILLY. Yes.

Mr. PANTZER. But we again feel that if it was a question of fact which was decided in the first case that there must be a question of fact decided in this case. The facts in the Hearst case are in fact so different from the facts in this case that except for the one ruling that this Board can ex cathedra find that the relationship of employer-employe exists in fact and which at common law it did not exist, the Hearst case has no application to this case. Now, we do, however, want a thorough reconsideration of the principles of agency law in the particular case to the extent that administrative expediency warrants it.

Now, we have had, at that plant, continuous friendly relations with other unions. We, for instance, have had a closed shop saw smiths union for 40 years, one of the oldest guild unions in Indianapolis. There are 59 saw smiths, additional apprentices and by an order of this Board entered a year and a half ago in another representation case, not to be confused with this case, it was held that the press-brake operators who help straighten armor-plate belonging within the jurisdiction of the saw smiths closed shop union, rather than the C. I. O. union shop union. The C. I. O. Union has been with us since 1937 and represents some 2,000
487 production employes in the two Indianapolis units and is, as I have stated, a union shop. In connection with our negotiations with both of those unions it was expressly agreed that watchmen would not be a part of the bargaining unit. Before we took on army work we had from four to six watchmen. When we switched over to war contracts, first in the South Illinois Street plant and subsequently after the government had constructed and leased to us the Fall Creek Ordnance Plant we were required to maintain 64 military police and pay their wages. The record shows that the government required us to pay their wages. That does not appear as I read any one of the other cases in your other records.

Now, that is the sole incident, the sole conventional incident, of the relationship between employer and employee that exists in this case.

Mr. HOUSTON. Do I understand your position—this is a little bit different to what Mr. Reilly asked you—that these men you claim are under the jurisdiction of the War Department, and the only connection you had with them was to pay their wages?

Mr. PANTZER. That is right. And the only relationship upon which this Board can base a finding that the employer-employe relationship existed is that sole incident of wage pay. The wages are, as the record shows, as we brought out in our own testi-
488 mony, paid by checks of E. C. Atkins & Company but as does not appear in the other records the clauses in our military contracts require us to maintain these auxiliary military police at our expense or we don't get the contracts and as the Chief of the Military Police explained on the stand we are required to pay those wages by the government. Now, no other incidents of the employer-employe relationship exists here. The right to hire does not exist. The right to fire does not exist. The right to discipline does not exist. The right to instruct and to command obedience with the respect of the details of carrying out a plant guard's work does not exist. The right to consider grievances on the part of plant guards does not exist. There is absolutely no right of seniority based on length of service. The right of promotion is inherent in the armed forces in Cincinnati, Ohio, as the record shows. The right of demotion springs from Cincinnati, Ohio. With the sole exception of the incident that technically the check comes from them no other incident of the relationship of employer-employe as we know it at common law or under any other decision pursuant to statute which can be called to attention exists in this case. In other words, if the Board finds upon the facts in this case that the employer-employe relationship exists it does decided violence to the facts; and understand, your Honor, I respect your other decisions. I have other clients in Indianapolis, for instance, organized by the Air Force. In the case of
489 those clients the plant guards have never taken the oath of office as a soldier in the Auxiliary Military Police. They are not subject to court martial. Their employment is finally made and their discharge is finally made by the employer and their wages are paid by the employer. Promotion may be made according to seniority or according to ability or according to any other arbitrary criteria that the employer desires to follow.

Mr. HOUSTON. In your case, how are these men engaged, who engages them and who handles grievances, and are they promoted and who discharges them?

Mr. PANTZER. With respect to the most instances, sir, with respect to the method of hiring and firing, hiring may be made in the first instance by the War Department as may firing; but generally hiring is in the first instance initiated by the employer. No one of the 64 plant guards was ever an employe of the company before the taking on of war work and the signing of the contracts with the government to maintain the Auxiliary Military Police as watchmen for the government in the plant.

The application for employment is signed in the Personnel Office of the company. It is then forwarded and the man is put

to work on probation. The application is then forwarded to Cincinnati and an F. B. I. man investigates the record of the employe thoroughly and finally after an investigation made upon that recommendation of hiring by the Personnel Di-
490 rector, the man is either engaged or dismissed. If he is engaged he then signs the contract with the government which also existed in the Aluminum case, swears the oath of office to support the military and to be governed by the Army Regulations, is issued his commission in the Military Police, a photostatic copy of which is in the record. He is issued his identification card signed by the Major in Cincinnati, not an identification card signed by the Personnel Department of the Atkins Company, and is solely subject to the rules and regulations of the plant.

Now, in that respect, Mr. Thomas, your Mr. who went on the stand first, bore out our contention just as completely as ours did.

I want to call the attention of the Board to the one possible misunderstanding in the record. The Union's witness, Mr. Gans, said that with respect to general orders of performing work, the orders of the military in Cincinnati were paramount but with respect to special orders for performing work the orders of the "company" were paramount. We were amazed at that testimony. It developed on cross-examination that what he meant was the "military company of military police," which has a Lieutenant Scanlon in charge of it in Indianapolis. So the first two or three times you come across the word "company" in the record don't be misled by coming to the conclusion that that means
491 the employer. It means the Military Police Company as his cross-examination amply shows.

Now, with respect firing, a recommendation from the company will also be considered but final firing is done from Cincinnati either by means of an Honorable Discharge Certificate which you will find in the record, or a Dismissal for Cause, which is not a certificate but a more informal document something like a letter, a copy of which you will also find in the record.

Mr. REILLY. I can understand, of course, why the company could not sever their military status, if that should be required by reason of this oath; but suppose that there was some guard whose conduct and character was so flagrant that they wouldn't want to have him around the plant, and while it is true the company's action, as I say, wouldn't sever his military status, wouldn't it effectively terminate any connection he had with that plant?

Mr. PANTZER. Well, I am coming to that. You are bringing up the one sore spot, my one complaint about the two hearings. I received the most courteous consideration of Trial Examiner Shroyer in the first case and Trial Examiner Persons in the second case, the Unfair Labor Practice case except that both of them denied my request for subpoena duces tecum to have the union,

which is a local organizing not merely the Atkins plant but a union organizing as well the Lyman-Harrington plant,
492 the Curtis Wright plant, the Mertz Engineering plant and I believe one other plant, a tool and die manufacturing company plant, to have the union brings into the hearing its existing collective-bargaining agreement with those four plants in order that we might show that the nature of the union relationship ran completely counter to the relationship imposed by the military authorities in Cincinnati upon our plant guards. Now, the only way in which I can show to your Honors that the relationship could not exist—and I think it was to that your your question was directed; am I right?

Mr. REILLY. That is right; yes.

Mr. PANTZER. If we read from the proposed collective-bargaining agreement submitted by the union—now, I am not going to read it at length. Let me merely summarize certain of the clauses and your assistant can then see whether or not my statements are honest.

Mr. THOMAS. Is that an exhibit in the case?

Mr. PANTZER. That is an exhibit in the case. In other words, Mr. Richardson, the record shows submitted to us a proposal for collective bargaining a copy of which I have in my hand and that's an exhibit in the unfair labor practice case. I do not have the number but I know you can find that, Mr. Thomas.

In the first place, the union asks for a union shop effective on 30 days after employment and demands therefore that we
493 dismiss. We have no power to dismiss these employes from our services—any employes who have not joined the union. Now, you may say that possibly we could have negotiated so as to avoid a union shop, but Mr. Richardson, the union organizer, testified that three of the four plants under his organization had union or closed shop contracts. In the second place, the proposal specifies: "It shall be the duty of the shift committeeman to take up with the proper company officer grievances or suggestions from employes on his shift or crew and also states that representatives of District No. 90 and the International Union may be present at all—at any or all of the meetings for the purpose of collective bargaining or the handling of grievance matters." That is almost the situation in the Russian Army but not yet the situation in the American Army. In other words, the testimony shows that the Army has the absolute right to discipline those employes. There isn't any question about it in the record. Now, whatever the facts may be, Sir, in your Aluminum Company record, or in your other records, or in the Hearst case with respect to denying a newsboy or denying a plant guard, respectively, the right to work, the company doesn't have it. That inheres in the military authority and we have no right to make a contract binding the military authorities in that respect. You can understand how that would completely destroy military discipline.

Mr. REILLY. I notice the record indicates the disciplinary powers of the military officials with regard to these men.
494 I thought there might be concurrent power on the part of the company but you feel that the record doesn't lend any support to that theory?

Mr. PANTZER. I do not, except in an advisory manner with respect to hiring and firing. There is no finding that there is any advisory authority on the part of the company to promote employes, to demote employes. Those promotions and demotions came from Cincinnati or were made by the Chief of the Military Police on the spot, without any consultation whatever with the Personnel Department of the company.

Mr. HOUSTON. On grievances, do they take that up with the Personnel Department of the company?

Mr. PANTZER. They have no grievances in the army. You are lucky if you get to salute your company commander, and the record so shows. In other words, if the army is wrong it's right. There is no National Labor Relations Act unfortunately, in the Army. I was in the last war and I think there should be some sort of grievance procedure but not the Russian kind.

Mr. REILLY. Then it is your position that these men are employes of the War Department? Is that correct? Did you read in the Grable case that statement prepared jointly by the War and Navy Departments with regard to their views of the legal status of these armed guards?

Mr. PANTZER. In other words, that there may be collec-
495 tive bargaining?

Mr. REILLY. Yes; there is reference to it in the decision. I am not sure that it is set out in full. I remember it was included in an exhibit.

Mr. PANTZER. Now, Mr. Reilly, I hope that when that order is taken judicial knowledge of in this case, because it is not in the record.

Mr. REILLY. Yes; I understand that.

Mr. PANTZER. That the Board will honestly put into the record the date of that order, because the date of that order is antecedent to the orders 1, 2, 3, and 4 which are in the record in this case, and your Grable case was decided before this more thorough organization of the Auxiliary Military Police under the Ordnance Department, not the Aircraft Department, the Lease Lend Department or the Navy Department, in Cincinnati, through its Civilian Security Service headed up by a major and captains and lieutenants.

Mr. REILLY. Your feeling is that even though your earlier arrangement made by the Army and Navy may have been such as to attain the relationship of employer-employe with regard to these men so far as companies were concerned that the arrangements they made in Indianapolis were so different that we have got to

examine these documents alone and decide whether there is an employer-employe relationship?

Mr. PANTZER. Precisely.

496 I concede, your Honor, that perhaps the Grable case may be right on its facts though none of the facts on my side of the case are noticed in the Grable case, because the Grable plant was not organized as our plant was. Consequently, that ruling of the War Department related to the rather loose supervision of plant guards who were nothing more than watchmen in the Grable plant. In other words, I maintain that had the union sought to organize our six watchmen that before the government took it over we would have had the Grable case in the Atkins situation.

Mr. REILLY. Yes.

Mr. PANTZER. Now, going back to the contract you will note that the contract violates very clearly the orders which are in evidence. It provides that rights to promotion, preference to shifts and the right to remain in the service of the company in case of reduction in force shall be governed by seniority. Now, it develops that the military authorities following the Manual of Guard Duty started an entirely different shift system with respect to these guards than we have in our plant. Our plant is run on fixed shifts. The year round a man works on the graveyard shift and doesn't rotate. These, according to the military service rotated in eight hour tours of guard duty. Furthermore, you will find, as the record illustrates that the orders which they swore to carry out are identically the same, through order No. 12,

497 of the order of an infantry soldier on guard duty under the Manual of Interior Guard Duty, photostatic copies of the proper pages of which are in evidence in this record.

Now, under that it would be absolutely impossible for the employer to promote or demote or give preference as to shift according to seniority. The Chief of the Military Police, may it please the Board, testified specially that the right of promotion, the right of discipline, depended entirely upon the ability and performance of the man.

Mr. HOUSTON. He determines that himself, doesn't he; I mean the chief?

Mr. PANTZER. The chief.

Mr. HOUSTON. Yes.

Mr. PANTZER. The chief, who is frequently visited by Captain Westenall from Cincinnati and Lieutenant Scanlon from Indianapolis.

Mr. HOUSTON. Yes; I understand that, but no member of the company has any voice in the matter?

Mr. PANTZER. No member of the company. The testimony was uncontradicted that these police have the right to arrest officers of the company, to discipline officers of the company, to keep them

from walking around in their own plants. This was entirely under the jurisdiction of the military authorities. And this contract provides that the management of the plant and the direction
498 of the working forces, including the right to hire, suspend or discharge for proper cause, or transfer and the right to relieve employes from duty because of lack of work or other legitimate reasons is vested exclusively in the company. I assume that some of those other contracts were *were* that, and they may be plants which were under the jurisdiction of the air force at the time the contracts were made, in which none of this military legerdemain if the Board chooses to look at it as legerdemain, and it certain is not legerdemain—was enforced.

Now, I have taken up my half hour. I hope I have impressed the members of the Board with my sincerity in believing that the incidents of the employer-employee relationship, as those words are used in the statute, do not exist in this case except with respect to the sole technical incident that the pay actually comes from the company but when you realize that the company is merely a conduit of that pay, made to pay it as a result of the contracts of the government, contracts which it was impossible to introduce in evidence because of the confidential nature of the product covered thereby. It will be seen that it is merely a technical incident and that in substance it is the government which is the paymaster of these troops.

Mr. REILLY. Just one more question. Are their wages fixed by some scale that appears in an Army manual or are they fixed by the company so far as any company has control of the
499 situation under the regulations under the War Labor Board?

Mr. PANTZER. Will you ask that question again, please?

Mr. REILLY. Yes; in fixing the wage rates for the guards do you have to conform to some standards in the Army or War Department Manual?

Mr. PANTZER. The record shows that in fixing their original wage rate which as I understand have not been increased since—and I interpolate now because the record doesn't show it but the wage rate of the saw smiths in the Saw Smiths Union and the C. I. O. employees in the C. I. O. Union has also not been changed for two and a half years, which well covers the period since when the Plant Guards came into the plant. They were initially fixed by a Form 10 application addressed to the National War Labor Board and we put that evidence into the record.

Mr. REILLY. Yes.

Mr. PANTZER. In other words, we have been fair in presenting all the facts.

Mr. HOUSTON. I don't know whether this is a relevant question or not but I want to ask it. Do you operate on a cost-plus basis on your contracts with the government?

Mr. PANTZER. No; we do not operate on a cost-plus basis. We have never been on that basis and the company is not in the best financial condition at this time for that reason.

It may interest you that a little later in the day I am
500 to discuss with representatives of the War Labor Board the matter of this steel base as it affects the Atkins Company.

Mr. HOUSTON. Yes.

Mr. PANTZER. The 17-cent wage increase and the guaranteed weekly wage, and so forth. But, that, of course, won't affect these plant guards because they are not in the C. I. O. Steel Workers Union.

Mr. REILLY. Mr. Thomas.

ORAL ARGUMENT OF MR. L. O. THOMAS

Mr. THOMAS. May it please the Board, I notice argument phased brought out by Respondent's attorney a repetition of arguments that are already in the record. I have not been able to distinguish anything new at all and I just want to leave this thought that even granting the assumption that the Army of the United States has made an exception in this one case and has special rules surrounding this one particular plant, that even so they have left certain matters which are the subject of collective bargaining and wages, if that were the only thing that were left it would still be a matter for collective bargaining and to that extent, at least, these individuals would be employes under the Act. The fact that the union made certain proposals as subjects for collective bargaining doesn't seem to me to be relevant at all in view of the fact that they are subject to collective bargaining and certainly if the company is precluded from arriving at
501 a certain agreement the union would have to recede from its particular position. Now, the fact that if this case is as you would be inclined to believe, from the remarks of counsel, it is the only case in the country in which this particular situation exists, which the union doubts, then we would be very much interested in that. We have many contracts with concerns covering militarized guards who have to take an oath in the army, who have to submit to F. B. I. investigation and who are completely under the supervision of the army to the same extent they believe as the guards in this case.

Mr. HOUSTON. And are still paid by the employer?

Mr. THOMAS. And are still paid by the employer. And even in the record, the documentary arguments, the point isn't raised so fine as it is here today, removing the company from the control of this force in many respects. I didn't get out of the record and the pleadings that clear a distinction. I got the fact that many things were subject to the supervision of the military forces and

I think that that is just and right. The company in the first place, however, entered into the agreement with the United States in which this was a clause. It was a voluntary proposition on the part of the company and I don't think that the military or the company, either one, can enter into a contract and deprive an individual of a right under an Act. These men are not part of the armed forces in the true sense of the word. They can be
502 called out the same as any police official to subdue local riot or something like that. So can a guard with a deputy sheriff's badge so they are not subject to call to any foreign service. They haven't obligated themselves to be called to a training ground and shoulder a rifle. They have obligated themselves to watch this plant and to follow the military rules that are set up for that purpose. And I can't believe, nor do I think the Board can believe, that the military is any more concerned about the guarding of that particular plant than it is the large aircraft plants throughout the country.

Mr. HOUSTON. Is there any distinction between these particular guards in this plant and any other militarized or aircraft factory?

Mr. THOMAS. Not to the Union's knowledge. That, of course, as a matter of fact would have to be established from the record but to the Union it seems unique that there should only be one place in the country where they cease to be employees when they are considered by the army which has already issued regulations to that effect, stating wherein it is possible for those people to bargain collectively. The only requirement that they make is that they not be a party or part of the same lodge that the production and maintenance employees are, that they have a separate union of their own, all of which has been carried out meticulously in this case as counsel's remarks would indicate. There is a
503 Guards Lodge in the City of Indianapolis. Nobody is eligible to it except those who are guards. I don't know whether it is in the record or not, but I make the statement and we are willing to substantiate it with exhibits, to the effect that we have contracts, plenty of them, covering militarized guards. Now, the rest of it probably would be the same as my colleague, Huhndorff, I agree whole-heartedly with——

The CHAIRMAN. Do you have any more?

Mr. THOMAS. I should like to say one sentence. I should like to ask of the Board that it take judicial knowledge of any public records which it has in the form of directions and decisions of election or orders in unfair labor practice cases with respect to the four or five other plants which this local Machinists Union has under organization in Indianapolis, in order to establish whether or not any contest of the existence of the employer-employee relationship was made by employers in those cases.

Mr. REILLY. Does the record indicate the names of those?

Mr. THOMAS. Yes; I mentioned three of them just a moment ago.

Mr. REILLY. Then we can check them.

Mr. THOMAS. Check them against your record and find out whether any contests were made. I understand that consent elections were held in those cases or recognition made without even an election.

504 Now, I have been unable to run the cases down in my services in Indianapolis. I have found nothing which runs counter to my statements. I therefore ask you to take judicial knowledge and if you find any facts that run counter to my observations—I am not stating them as a matter of fact because I don't know the ultimate facts—but you cite them in your opinion.

Mr. REILLY. Yes.

Mr. THOMAS. There is a standard clause that takes care of any army regulation as they affect a collective bargaining agreement. In other words, it says if there are any army regulations to the contrary they are controlling. If Mr. Pantzer would give the dates of these orders that counsel was curious about.

Mr. PANTZER. Well, let me be fair to Mr. Thomas, who is not conversant with the record, in the proposal of the union, Mr. Thomas, from which I read just a few minutes ago——

Mr. THOMAS. That is in the record.

Mr. PANTZER. In my direct statement, appears an Article Numbered VIII bearing the heading "War Department Regulations" reading as follows: "It is understood that for the duration of the war this agreement is in all respects subject to the provisions of the directives of the War Department concerning military organizations of the plant guard forces, W. D. Directive, July 2,

505 1942, A. G. 231.43, 808 circular (blank 1942, and any amendments thereto, and that nothing contained in this agreement shall be construed in any way to interfere with the organization, efficiency, training, and control by the War Department of the company guard force as an auxiliary to the Military Police nor to abrogate or interfere with the duties, responsibilities and rights imposed by the War Department upon any employe in such Auxiliary Military Police." You might as well not have a collective bargaining agreement with the proposals which I read in my direct statement as have that in the agreement. That is not collective bargaining if it means what it says. But I call attention to the dates of those orders which antidate by substantially a year the new system set up by the government with respect to the Auxiliary Military Police from Cincinnati out.

Mr. REILLY. Thank you.

Mr. THOMAS. The order to which I refer is dated May 10, 1943.

Mr. REILLY. Would you show the document to Mr. Pantzer and see if he has any objection to it (handed over to him).

Mr. PANTZER. I have never seen this document. May I have a moment's time to consider it?

Mr. REILLY. Yes indeed.

(Discussion off the record.)

Mr. PANTZER. I have glanced through the document which was handed me by Mr. Thomas and find it is a conformed copy
506 of a collective bargaining agreement entered into between the Aircraft Accessories Corporation, Kansas City Division, including Slater, Missouri, and the Auxiliary Military Police and Guards Union, a subdivision of the International Association of Machinists. I have glanced through the various provisions therein contained and I should say ninety percent of them are entirely out of consonance with the material contained in the military order from Cincinnati. Now, it was denial of my request for subpoena that prevented me from showing how out of accord with military discipline these three or four or five other contracts of this union, actually imposed upon and signed by the employers, were.

May I leave this with the Board, or do you want it for your files?

Mr. THOMAS. Well, I will finish you copies.

Mr. PANTZER. If he would send copies to the Board and to me I think it would be illustrative rather than in defeat of the point I make.

Mr. REILLY. Yes; I take it that there is no objection to our receiving it, is that right?

Mr. THOMAS. No.

Mr. PANTZER. I have no objection to the Board's receiving and making an exhibit if the document provided that Mr. Thomas will send a copy to me.

Mr. REILLY. Yes; that is understood.

507 (Discussion off the record.)

Mr. REILLY. On the question of the relevance it would seem to me that the real question in this case is whether the orders and contracts of the government applicable to this company are such that the government can determine that the control exercised over them by the company is so continuous as to indicate that the employer-employee relationship did not exist so that while the collective agreement which you offered is of interest it wouldn't necessarily have any bearing on this point since the argument seems to be confined——

Mr. PANTZER. I think you were about to suggest, Mr. Reilly, that if it is made an exhibit I get to see it.

Mr. REILLY. Oh, yes, indeed.

Mr. PANTZER. And I want to call attention to the fact that it is a contract very obviously with an aircraft producing firm and none of the aircraft producing firms in our area, including Curtiss-Wright and so forth have had the military regulations enforced. Even today, in May 1944 that is so.

Mr. REILLY. Thank you, gentlemen.

(Whereupon the oral argument was closed.)

508 [Clerk's certificate to foregoing paper omitted in printing.]

510 In the United States Circuit Court of Appeals for the Seventh Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E. C. ATKINS AND COMPANY, RESPONDENT

Petition for enforcement of an order of the National Labor Relations Board

Filed Aug. 28, 1944

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C. § 151, et seq.), respectfully petitions this Court for the enforcement of its order against respondent, E. C. Atkins and Company, Indianapolis, Indiana, and its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90 and and their affiliate, Local 1683, Case No. 9–R–1200," and, "In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, Case No. 9–C–1982."

In support of this petition, the Board respectfully shows:

(1) Respondent is an Indiana corporation, engaged in business in the State of Indiana, within this judicial circuit, where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference
511 is hereby made, the Board, on May 30, 1944, issued a decision and order directed to the respondent, and its officers, agents, successors, and assigns.

The aforesaid order provides as follows:

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, E. C. Atkins and Company, Indianapolis, Indiana, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Association of Machinists, District 90, and their affiliate, Local 1683, affiliated with the American Federation of Labor, as the exclusive representative of all plant guards at its two Indianapolis plants, excluding the chief, lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Association of Machinists, District 90, and their affiliate, Local 1683, affiliated with the American Federation of Labor, as the exclusive representative of all plant guards at its two Indianapolis plants, excluding the chief, lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately in conspicuous places throughout its two Indianapolis plants, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order, and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of this Order;

512 (c) Notify the Regional Director for the Ninth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

(3) On May 30, 1944, the Board's decision and order was served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Messrs. Barnes, Hickam, Pantzer & Boyd, 1313 Merchants Bank Building, Indianapolis 4, Indiana, respondent's counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court a transcript of the entire record in the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring respondent, and its officers, agents, successors, and assigns, to comply therewith.

NATIONAL LABOR RELATIONS BOARD,
(S) Malcolm F. Halliday,
MALCOLM F. HALLIDAY,
Associate General Counsel.

Dated at Washington, D. C., this 24th day of August 1944.

513 [*Duly sworn to by Malcolm F. Halliday; jurat omitted in printing.*]

515 In the United States Circuit Court of Appeals for the Seventh Circuit

Case No. 8669

[Title omitted.]

Motion of respondent, E. C. Atkins and Company, to require petitioner to conform appendix and brief to the rules of this court

Filed Sept 26, 1944

Comes now E. C. Atkins and Company, the Respondent in this cause, and in support of its motion to require Petitioner to conform Appendix and Brief to the Rules of this Court, alleges:

1. That the "Appendix to Petitioner's Brief," filed in this cause on September 6, 1944, fails to comply with Rule 35, Section 4, Clause (c), of this Court, requiring the Petitioner to "print as a part of the appendix to his brief the pleadings, together with the findings of fact, conclusions of law, order and opinion of the board," in that such Appendix fails to set forth the "Statement of Exceptions to Intermediate Report, Record, and Proceedings," executed by the Respondent on March 6, 1944, and filed in this cause on March 8, 1944, consisting of fourteen typewritten pages.

516 (a) Section 32 of the Rules and Regulations Series 3 of the National Labor Relations Board, effective November 26, 1943 (before February 19, 1944, the date of the Intermediate Report rendered by Trial Examiner Persons herein), provides as follows:

"SEC. 32. Intermediate Report; contents; service; transfer of case to Board.—After a hearing for the purpose of taking evidence

upon a complaint, the Trial Examiner shall prepare an Intermediate Report * * *."

(b) Section 33 of the Rules and Regulations Series 3 of the National Labor Relations Board, effective November 26, 1943, provides as follows:

"SEC. 33. Exceptions; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exception.—Within fifteen days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of this Article, any party or counsel for the Board may file with the Board at Washington, D. C., an original and four copies of a statement in writing setting forth such Exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. * * *"

(c) Section 35 of the Rules and Regulations Series 3 of the National Labor Relations Board, effective November 26, 1943, provides as follows:

517 "SEC. 35. Action of Board upon expiration of time to file Exceptions to Intermediate Report; oral arguments before and filing of briefs with Board; action of Board where Trial Examiner finds no unfair labor practices and no Exceptions filed; reopening of record.—Upon the expiration of the period for filing a statement of Exceptions and brief, as provided in Section 33 of this Article, the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other agent or agency, or may close the case upon the compliance with the recommendations of the Intermediate Report, or may make other disposition of the case. * * *"

(d) The "Statement of Exceptions to Intermediate Report, Record, and Proceedings," executed by the Respondent on March 6, 1944, and filed in this cause on March 8, 1944, is, in the opinion of the Respondent, a pleading absolutely essential to the record of this case in this Court.

2. That the "Brief for the National Labor Relations Board" filed in this cause on September 18, 1944, fails to comply with Rule 35, Section 5, and Rule 16, Section 4, of this Court, requiring the statement of facts to show the pages of the transcript of the record, in which the "War Department Regulations providing for the Activation of Auxiliary Military Police Units," set forth as an "Addendum" at pages 20 to 44, both inclusive, of such Brief (hereinafter referred to as the "War Department Regulations"), appear.

(a) The War Department Regulations were never offered or admitted in evidence in this case and do not constitute a part
518 of the "Transcript of the Record filed in this Court," referred to in Rules 34 and 35.

(b) The War Department Regulations are the principal basis of the arguments set forth in points A. and B. of the Petitioner's Brief (see all references marked "infra" on pages 8 to 12, both inclusive, of such Brief).

(c) At the hearing held September 24, 1943, the only military orders offered in evidence to show the relationship between the plant guards and the War Department were Guard Order No. 1, dated May 10, 1943 (Respondent's Exhibit No. 10); Guard Order No. 2, dated May 11, 1943 (Respondent's Exhibit No. 11); and Guard Order No. 3, dated May 12, 1943 (Respondent's Exhibit No. 12), all issued by the Continuous Security District Office of the War Department, at Cincinnati, Ohio, and issued over the signature of B. R. Witenhall, Captain C. M. P. District Plant Guard Officer, and letter under date of June 7, 1943 (Respondent's Exhibit No. 4), issued over the signature of A. C. Rasmussen, Lt. Col., Ord. Dept. District Chief. All the issues herein, both in the representation proceedings and the unfair labor practice proceeding, were tried upon the assumption that the said Respondent's Exhibits Nos. 10, 11, 12, and 4, were the sole written exhibits setting forth the military orders showing the relationship between the plant guards and the War Department.

519 (d) No request was either made or granted in the representation case or at the hearing in the unfair labor practice case to take judicial notice of the terms and conditions of the War Department Regulations.

(e) The War Department Regulations are not such a document as this Court may take judicial notice of at the argument, or in rendering its decision herein.

(f) If the War Department Regulations are permitted to be the basis of Petitioner's case herein, they substantially change the theory of such case and the evidence upon which it is based. It is, therefore, imperative for the Respondent to know in advance of writing Respondent's brief whether or not the War Department Regulations are properly before this Court.

Wherefore, the Respondent prays this Court that it order the Petitioner to do the following:

1. Supplement the "Appendix to Petitioner's Brief" by setting forth therein the "Statement of Exceptions to Intermediate Report, Record, and Proceedings," executed by the Respondent on March 6, 1944, and filed in this cause on March 8, 1944.

2. Strike out from the "Brief for the National Labor Relations Board" the War Department Regulations set forth as
520 an Addendum at pages 20–44 thereof, and all references to such addendum contained in such Brief.

BARNES, HICKAM, PANTZER & BOYD,
By KURT F. PANTZER,
Attorneys for Respondent.

522 In the United States Circuit Court of Appeals for the Seventh Circuit

No. 8669

[Title omitted.]

Memorandum of National Labor Relations Board in opposition to Respondent's motion to require the Board to supplement its Appendix and to strike certain portions of its brief

Filed Oct. 2, 1944

I

With respect to respondent's motion that the Board be required to supplement the appendix to its brief by setting forth respondent's "Statement of Exceptions to Intermediate Report, Record, and Proceedings" dated March 6, 1944, the Board desires to inform the Court that the Board, by letter dated September 28, 1944, authorized the printer to prepare a supplemental appendix containing this document, which the Board inadvertently failed to designate for printing in the Designation heretofore filed herein.

II

Respondent's motion that the Board be required to strike from its brief the War Department Regulations providing for the Activation of Auxiliary Military Police Units, dated March 17, 1943, which the Board included as an addendum to its brief, should be denied for the following reasons. The Regulations in ques-
523 tion were promulgated by the War Department pursuant to the authorization contained in Executive Order No. 8972 dated December 12, 1941, issued by the President in the exercise of his constitutional authority as Commander in Chief of the Army and Navy of the United States for the purpose of affording protection of national defense material, premises, and utilities from injury or destruction. It is well settled that such regulations, like regulations of executive officers of the Government issued in the exercise of their statutory functions, have the force and effect of law. United States v. Grimaud, 220 U. S. 506, 520–523; United States v. Morehead, 243 U. S. 607, 613–616; Maryland Casualty Co. v. United States, 251 U. S. 342, 349; Lilly v. Grand Trunk R. Co., 317 U. S. 481, 488. Having such effect, the regulations in question, even though not formally introduced into evidence, may be judicially noticed by this Court just as decisions of the courts and administrative agencies and acts of Congress are judicially noticed and considered. Caha v. United States, 152 U. S. 211, 221–222; Lilly v. Grand Trunk R. Co., 317 U. S. 481, 488; Givens v. Zerbst, 255 U. S. 11, 18.

Having the force and effect of law, the Board may rely on these Regulations in its argument to this Court and the Court may take notice thereof and consider them, irrespective of the fact that respondent was not specifically put upon notice at the hearings before the Board as to the scope of the Board's argument to be presented in this Court. Respondent is presumed to be familiar with the basic authority underlying Lt. Col. Rasmussen's action in issuing the letter of June 7, 1943, which assertedly governed the militarization of respondent's plant guard forces. As the Supreme Court has held, "those dealing with an agent of the United States must be held to have had notice of the limitations of his authority." Wilber National Bank v. United States, 294 U. S. 120, 123–124; Sutton v. United States, 256 U. S. 575, 579; Whiteside v. United States, 93 U. S. 247, 256–257.

524 Moreover, Lt. Col. Rasmussen's letter of June 7, 1943, which respondent introduced into evidence, referred to the action of the Secretary of War in directing the military organization of plant guard forces as Auxiliary Military Police (B. A. 58–58i, par. 1). Thus respondent was put upon notice of the existence of the underlying authority for Lt. Col. Rasmussen's action in issuing the letter of June 7, 1943, concerning the militarization of civilian guard forces. In these circumstances, particularly, respondent may not validly claim that it was taken by surprise by the Board's reliance in this Court upon the basic War Department Regulations governing the militarization of civilian guard forces.

Wherefore, the National Labor Relations Board, petitioner herein, prays that respondent's motion to require the Board to strike said War Department Regulations from its brief herein be denied forthwith, or, in the alternative, that the Court reserve its decision on said motion pending its consideration of this cause on the merits.

Respectfully submitted.

(S) Malcolm F. Halliday,
MALCOLM F. HALLIDAY,
Associate General Counsel,
National Labor Relations Board.

Dated September 30, 1944.

526 In the United States Circuit Court of Appeals for the Seventh Circuit

Case No. 8669

(Title omitted.)

Reply of Respondent, E. C. Atkins and Company, to answer memorandum of Petitioner respecting motion of Respondent to require Petitioner to strike addendum, and all references to addendum, from Petitioner's brief

Filed Oct. 5, 1944

Comes now E. C. Atkins and Company, the Respondent in this cause, and for reply to the Answer Memorandum of the Petitioner respecting the Motion of the Respondent to require the Petitioner to strike the Addendum, and all references to the Addendum, from the Petitioner's Brief, alleges:

1. The "Addendum," which, together with references thereto, the Respondent has moved to be stricken from Petitioner's Brief, is Circular No. 15, dated March 17, 1943, issued by the Headquarters, Army Service Forces, Washington, D. C., relating to "Auxiliary Military Police." In Respondent's Motion, and in this Reply, such Circular is referred to as the "War Department Regulations."

527 The Petitioner's Memorandum advises that the War Department Regulations "were promulgated by the War Department pursuant to the authorization contained in Executive Order No. 8972 dated December 12, 1941, issued by the President in the exercise of his constitutional authority as Commander in Chief of the Army and Navy of the United States for the purpose of affording protection of national defense material, premises, and utilities from injury or destruction."

The Respondent denies that the War Department Regulations were promulgated by the War Department, as is perfectly obvious upon perusal thereof. In this sense, both the use of the words "War Department" by the Petitioner and the citation of the cases of the Petitioner are a trifle loose and inaccurate. The Respondent admits that Executive Order No. 8972, dated December 12, 1941, was issued by the President. Executive Order No. 8972, dated December 12, 1941, of which this Court is required to take judicial notice pursuant to the provisions of Sections 304, 305 and 307 of the Federal Register Act (U. S. C. A. 44, § 301 ff. July 26, 1935) reads as follows: "Executive Order 8972, authorizing the Secretary of War and the Secretary of the Navy to establish and maintain military guard and patrols, and to take other appropriate measures, to protect certain national-defense material, premises, and utilities from injury or destruction.

"Whereas the United States is now at war; and

"Whereas there exists a serious and immediate potential danger of sabotage to national-defense material, national-defense
528 premises, and national-defense utilities which may menace our maximum productive effort; and

"Whereas the Congress of the United States has in recent enactments recognized this danger by enjoying efforts to injure, interfere with, or obstruct the national defense, and providing severe penalties therefor; and

"Whereas it is considered necessary in the interests of national defense that, in particular situations where hazardous, dangerous,

or other unfavorable conditions may from time to time exist, special precautionary measures be taken by establishing and maintaining military guards and patrols or other appropriate means to protect from injury or destruction national-defense material, national-defense premises, and national-defense utilities:

"Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander-in-Chief of the Army and Navy of the United States, I hereby authorize and direct the *Secretary of War, whenever he deems such action to be necessary or desirable*, and the Secretary of the Navy, whenever he deems such action to be necessary or desirable, to establish and maintain military guards and patrols, and to take other appropriate measures, to protect from injury or destruction national-defense material, national-defense premises, and national-defense utilities, as defined in the act of April 20, 1918, 40 Stat. 533, as amended by the act of November 30, 1940, 54 Stat. 1220, and the act of August 21, 1941, 55 Stat. 655.

"This order shall not be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, Department of Justice, with respect to the investigation of alleged acts of sabotage.

"FRANKLIN D ROOSEVELT.

THE WHITE HOUSE,
December 12, 1941." [Emphasis Ours.]

One of the principal purposes of the Federal Register Act was to make available, for the purpose of constructive notice and judicial notice, the fast multiplying Executive Orders, 329 Directives, Regulations, etc., which the Federal Government is promulgating. It would seem to be safe and fair to the average citizen to assume that he need not take constructive notice of any other documents. Certainly, that clause of Section 307 of the Federal Register Act, which provides that "unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under § 305 of this chapter, shall, except in cases where notice by publication is insufficient in law be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby," does not affirmatively apply to the War Department Regulations upon which the Petitioner at this late date now desires to base its case.

The six cases cited by the Petitioner in its Brief are all cases in which a statute expressly directed the heard of an Executive Department, or Administrative Department, such as the Secretary of War, personally, or the Interstate Commerce Commission, to promulgate rules and regulations in the first instance, or to approve them as promulgated after they have been prepared by a subordinate officer or bureau. In not one of the cases is a regulation, not promulgated under the hand of the head of the Executive De-

partment, or by order of the Administrative Tribunal concerned, given statutory effect or judicially noticed.

It is to be kept in mind that in the instant case, the Petitioner is seeking an Enforcement Order or Injunction
530 against the Respondent upon the theory that the Respondent was guilty of an Unfair Labor Practice by virtue of having refused to obey the War Department Regulations, referred to. These War Department Regulations were neither introduced in evidence nor referred to at any one of the following occasions in which this matter has been in controversy:

1. The hearing on the representation petition.
2. The Decision and Order on the representation petition.
3. The hearing in the Unfair Labor Practice Case.
4. The Intermediate Report in the Unfair Labor Practice Case.
5. The argument in Washington before the National Labor Relations Board in the Unfair Labor Practice Case.
6. The final Decision and Order in the Unfair Labor Practice Case.

Neither is Executive Order No. 8972, dated December 12, 1941, and issued by the President, or the War Department Regulations, referred to in any way, shape, or form in the "Petition for Enforcement of an Order of the National Labor Relations Board," executed August 24, 1944, which is now pending before this Court (Appendix to Petitioner's Brief, pp. 1 to 4).

Although the decision in Nagle v. United States, 145 Fed. 302 (C. C. A. 2 (1906) has probably been overruled if the rules
531 and regulations therein referred to were issued over the signature of the Postmaster General (the head of a Federal Executive Department), common sense of the decision is doubtless still good, and is consequently here quoted for the purpose:

"Reference is made to the regulations of the post office, and some sections thereof are printed in the brief, but none of them are set forth in the record. The decisions of the Supreme Court on the subject of judicial notice of such rules and regulations are not entirely uniform. Caha v. U. S., 152 U. S. 221, 14 Sup. Ct. 513, 38 L. Ed. 415; The E. A. Packer, 140 U. S. 367, 11 Sup. Ct. 794, 35 L. Ed. 453. Where there is some question of statute law, where the court can itself by reference to books with which it is familiar, and which each judge posseses, determine just what statutory provisions were in force at a given date, there is no necessity for incumbering the record with them. But it is different

with departmental regulations. No department ever sends its compilation of regulations to the judges. They are frequently amended, and, without special information from the department, no one can tell whether a particular regulation in some printed compilation was in force a year later. It is grossly unfair to a trial judge to cite some regulation upon a brief on appeal which was not laid before him on the trial. We have no doubt that it is far better practice to read any special regulations which may be relied upon into the record before the trial court. It is a hopeless task for an appellate court to determine what such regulations were at any particular time. It must either accept counsel's statement, or itself make inquiry of the particular department; neither of which practices is to be commended. It is to be hoped that upon the new trial the various regulations bearing upon the questions presented by the case may be specifically referred to."

The Respondent again shows that in order properly to analyze the Petitioner's case on this appeal, and further to prepar
532 Respondent's Brief, the decision of this Court should be made prior to the preparation and filing of such Brief, and not be kept pending the consideration of this cause by this Court on its merit.

Wherefore, E. C. Atkins and Company, the Respondent herein, prays that the Respondent's Motion to Require the Board to strike said War Department Regulations, and any and all references thereto, from its Brief be granted.

BARNES, HICKAM, PANTZER & BOYD,
By KURT F. PANTZER,
Attorneys for Respondent.

Dated at Indianapolis, Indiana, October 4, 1944.

533 In United States Circuit Court of Appeals

[Title omitted.]

Order overruling motion.

October 9, 1944

It is ordered that the motion of respondent to require petitioner to conform appendix and brief to the rules of this Court be, and it is hereby, overruled, without prejudice to the right to present it at the hearing on the merits.

534 In the United States Circuit Court of Appeals for the Seventh Circuit

No. 8669—January Term, 1945, October Session, 1944

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

E. C. ATKINS AND COMPANY, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

Before SPARKS, MAJOR, and KERNER, Circuit Judges.

Opinion

Filed February 27, 1945

MAJOR Circuit Judge. This case is here on petition of the National Labor Relations Board for enforcement of its order issued May 30, 1944 against respondent, pursuant to Sec. 10 (c) of the National Labor Relations Act. The Board, upon a charge filed by the International Association of Machinists, District 90, and its affiliate Local 1683 (hereinafter called the Union), issued its complaint charging that respondent had violated Sec. 8 (5) and (1) of the Act. In its answer to the Board's complaint, respondent admitted that it had refused to bargain collectively with the Union, as alleged in the complaint, but urged that members of the unit for whom the Union sought to bargain were not employes of respondent within the meaning of the Act, and that consequently its refusal to bargain did not constitute a violation. The Board decided adversely to respondent and entered its cease and desist order now sought to be enforced.

535 No evidence was offered by either of the parties at the hearing on the unfair labor practice charge; however, it was stipulated that the evidence which had theretofore been offered in a representation proceeding should be considered. In this latter proceeding, instituted by the Union on October 19, 1943, it was determined by the Board that the militarized plant guards at respondent's plants were employes within the meaning of the Act and that; excluding certain supervisory employes, they constituted an appropriate bargaining unit within the meaning of Sec. 9 of the Act. The Board accordingly directed that an election be held among the employes in said unit. Following the election, the Board on November 29, 1943, certified the Union as the exclusive bargaining representative for such employes.

The primary issue now presented, stripped of all camouflage, is whether the members of the unit for whom the Union sought to bargain were employes of respondent within the meaning of Sec. 2

(2) and (3) of the Act. It is also contended by respondent that even though the position of the Board be sustained in this respect, its order should not be enforced, on the ground that its enforcement would not effectuate the policies of the Act.

Respondent urgently insists that the findings of the Board are insufficient to support its order, and particularly that at no time has the Board made a specific finding on the issue as to whether the members of the bargaining unit are its employes within the meaning of the Act. While there is some merit in this criticism, it cannot be doubted but that the Board determined such issue adversely to respondent and that respondent was aware of such determination. Respondent also contends that the Board was without authority in the unfair labor practice case to make findings in addition to those made in the representation case. It is true, as already stated, that no additional evidence was offered in the latter case but, nevertheless, we are of the view that the Board, with the record of both proceedings before it, had a right to make such further findings as it deemed appropriate.

We are of the view, also, that the findings contained in its decision in the unfair labor practice case, if substantially supported, are sufficient to support its order. In studying this record for the purpose of ascertaining if such support is present, we are not unmindful of the admonition so often repeated that a court is
536 not permitted to weigh the evidence and substitute its judgment for that of the Board. As stated in the recent case of National Labor Relations Board v. Hearst Publications, Inc., 322 U. S. 111, 130:

"Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record."

The Hearst case is strongly relied upon by the Board. It is true that the issue there decided, that is, whether the members of the unit which sought the right to bargain were employes within the meaning of the Act, was the same as the issue in the instant case. The facts of that case, however, are so widely different from those of the instant case that it is of little, if any, assistance here. It is pertinent to note that the court was particular to point out in detail the vast amount of control which the publisher had over the newsboys in question. The court also recognized that many forms of service relationship are not within the meaning of the Act. It stated (page 126):

"Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight. And consequently the legal pendulum, for purposes of applying the statute, may swing one way or the other, depending upon the

weight of this balance and its relation to the special purpose at hand."

Therefore, we are of the view that the decision in the Hearst case requires rather than precludes a review of the facts in the instant case, with a view of ascertaining if they reasonably support the Board's order. Furthermore, we are of the view that common-law tests are not to be ignored, although not exclusively controlling, and that any test utilized must be consistent with the purposes of the Act.

Respondent is a corporation operating two plants in Indianapolis, Indiana. One of such plants (referred to as the Main Plant) has been owned and operated by respondent since 1857; the other (referred to as Fall Creek Ordnance Plant) is owned by the federal government and was constructed for war purposes. Respondent operates the latter under a lease from the federal government, the terms and conditions of which are confidential
537 for military reasons. The latter is a military reservation, and the Main Plant is listed by the government as a restricted area under government supervision.

Since 1941, respondent has been engaged exclusively in the manufacture of armor plate for the federal government. Prior thereto, it was engaged in the production of saws and saw tools at the Main Plant. At that time respondent had as its employes some fifty-nine sawsmiths who for a period of over forty years had been organized by and were members of the Sawsmiths Federal Labor Union No. 18548 (sometimes referred to as the Federal Local), and 1,208 production and maintenance employes who had since 1937 been members of the United Steel Workers of America, Local 1543, affiliated with the C. I. O. (sometimes referred to as the C. I. O. Local). Respondent also had four employes, designated as watchmen, who were not members of any Union. Two of these employes worked on the night shift and two on the day shift. The duties of the former were to check the eighty-two night clocks in the plant, and those of the latter to watch or guard the gates of the plant. These four jobs were known as "pensioners' jobs."

The authority for the establishment of a plant guard system flows from Executive Order 8972, issued by the President of the United States on December 12, 1941. The order is entitled: "Authorizing The Secretary Of War And The Secretary Of The Navy To Establish And Maintain Military Guard And Patrols, And To Take Other Appropriate Measures, To Protect Certain National-Defense Material, Premises, And Utilities From Injury Or Destruction." The resolution, after reciting the situation pertaining to the crisis confronting the government as a result of war, states:

"Therefore, by virtue of the authority vested in me as President of the United States, and Commander-in-Chief of the Army and Navy of the United States, I hereby authorize and direct the

Secretary of War, whenever he deems such action to be necessary or desirable, * * * to establish and maintain military guards and patrols, and to take other appropriate measures, to protect from injury or destruction national-defense material, national-defense premises, and national-defense utilities * * *."

It is to be noted that the purpose for which a plant guard
538 system was to be inaugurated is clearly stated in this executive proclamation.

In conformity with such order, there was issued by the War Department under date of July 2, 1942, a proclamation entitled "Military Organization of Plant Guard Forces," which provided in part:

"Guard forces at all War Department plants * * * are to be organized, drilled and instructed as military units subject to the Articles of War.

"These guard forces will be organized as a civilian auxiliary to the Military Police in all ammunition plants and plants where the possibility of sabotage is greatest * * *.

"At the time any guard force is organized as a civilian auxiliary to the Military Police, the commanding officer having jurisdiction over the guard force will:

"a. Cause the Articles of War prescribed by Article 110 thereof to be read and explained to each member of the guard force;

"b. Issue orders and regulations setting forth the duties and responsibilities of the guard force;

"c. Organize each guard force with a member of the Army of the United States in command and cause each force to be drilled and instructed with a view to supplementing the Army in resisting attack on war material, war premises, and war utilities which the force is assigned to guard.

"d. Require each member of the guard force to give a pledge of loyalty to the United States, and to execute an agreement acknowledging that such Articles of War are understood by him and that he is subject to military law as long as he remains a member of the guard force. (A draft of a form of such agreement is attached.)"

The form of agreement is entitled, "Agreement between the United States of America and ----------." The pro-
(Plant Guard)
posed agreement states that the government is approving the employment of guards "for the purpose of guarding and protecting war material, war premises and war utilities from injury or destruction by the enemy or otherwise, including the making of
539 arrests, as peace officers for violations of Federal laws, as well as for violations of orders and regulations issued by military authority." The proposed agreement then provides:

"Now, therefore, I, ----------, who have been or am about to be employed by ---------- as a guard at ---------- for the purpose of guarding cer-

tain war material, war premises, and war utilities, in consideration of my employment or the continuation of my employment, do agree with the United States of America that:

"(1) I will support and defend the Constitution of the United States against all enemies, foreign and domestic;

"(2) I will bear true faith and allegiance to the Constitution of the United States;

"(3) I will well and faithfully discharge my duty as a civilian auxiliary to the military police to protect war material, war premises, and war utilities against all enemies, foreign and domestic, and will obey any orders issued in connection therewith by the President, as Commander-in-Chief of the Army and Navy of the United States, and by his duly authorized officers;

"(4) I acknowledge that the appropriate Articles of War have been read and explained to me, and that in the performance of my duty to protect such war material, war premises, and war utilities, I am subject to military law during the period of my employment.

_____"

(Signature of Plant Guard)

At the time respondent entered into its relationship with the federal government for the manufacture of armor plate (the record does not disclose the exact date but it was sometime in 1941), representatives from the Cincinnati Ordnance Office of the United States Army made a survey of respondent's plant facilities and prescribed the requirements of the government relative to protection. As soon as contracts for the production of war goods were entered into between the Army and respondent, a clause was inserted, stating, "Unless proper protection of government property is provided, in compliance with certain directives, the contract will be cancelled." It was in compliance with this requirement that respondent entered into a relation with those whom the Board has found to be its employees. A staff of
540 sixty-four plant guards was installed, of which thirty-two were stationed at the Main Plant and thirty-two at the Fall Creek Ordnance Plant. As heretofore stated, respondent had theretofore employed only four watchmen, and with the exception of these four, none of the sixty-four persons installed as plant guards had previously been engaged in the service of respondent.

In Cincinnati, the War Department maintained a Continuous Security District Office, headed by A. C. Rasmussen, Lieutenant Colonel, Ordnance Department, as District Chief, and B. R. Wetenhall, Captain, Corps of Military Police, District Plant Guard Officer. There was no local resident Commanding Officer for the two plants of respondent, but such plants were included in a "group of plants" for which Lieutenant Scanlon of the Corps of Military Police was the Plant Guard Officer. Headquarters were maintained by him in Indianapolis for the training and discipline

of plant guards of respondent, as well as those of other plants in a certain jurisdiction. At the Main Plant, the guards were in charge of Chief Johnston, and at the Ordnance Plant in charge of Chief Hann. Under each of these Chiefs were four guards designated as Lieutenants. Of these two Chiefs and eight Lieutenants, none were Army men.

In addition to Executive Order 8972 and the War Department's proclamation of July 2, 1942, heretofore quoted, there were issued by the War Department or some representative thereof a number of documents relative to the duties, obligations and rights of the members of the plant guard force. These documents in some respects also attempted to fix the obligations and rights of respondent. Included in such documents is a War Department directive of March 17, 1943, referred to as Circular No. 15,[1] and "Plant Protection Data Binder" dated June 7, 1943, issued by the Continuous Security District Office of the War Department at Cincinnati. Other material documents include guard orders Nos. 1, 2 and 3, issued by the Cincinnati Office on May 10, 11 and 12, 1943, respectively.

Four witnesses were heard by the Board, namely, Gann Richardson presented by the Union in the representa-
541 tion proceeding, and Johnston and Wood who testified in behalf of respondent. Johnston was Chief of the plant guard force, and Wood was respondent's personnel manager. In fact, the entire proof as to the relation which actually existed between the plant guard employes and respondent was furnished by these witnesses.

We shall now examine the Board's findings, upon which its order is predicated. It first quotes the first paragraph of the agreement (heretofore quoted in full), in which the guard recites: "* * * I, ----------, who have been or am about to be employed by ---------- as a guard at ---------- * * *." There is nothing, however, in the Board's decision or findings as to what, if any, importance it attaches to the statement just quoted. Moreover, it would appear that this self-assertion would not constitute proof against respondent when contained in an agreement to which it was not a party. It is also pertinent to note that this form of agreement was furnished by the government and that an applicant could not obtain a guard position until it was signed. The "Plant Protection Data Binder," issued June 7, 1943 by the Cincinnati Office, provided: "If a guard refuses to sign the agreement he may (but need not) be temporarily retained with the understanding that he will be dismissed as soon as he is replaced, and in any event within a reasonable time." It is significant, and this the Board omitted to mention in its decision, that the plant guard in this

[1] Circular No. 15 has been printed by the Board as a supplement to its brief. It was not introduced in evidence, and respondent contends that it cannot be considered as proof in support of the Board's order. It is a public document of which, so we think, a court may take judicial notice. Standard Oil Co. v. Johnson, 316 U. S. 481, 483.

agreement pledged his allegiance to the government and stated: "I will well and faithfully discharge my duty as a civilian auxiliary to the military police to protect war material, war premises, and war utilities * * * and will obey any orders issued in connection therewith by the President, as Commander-in-Chief * * * and by his duly authorized officers." It is further significant that in this agreement no mention is made of any allegiance owed to respondent, or any obligation to take orders therefrom.

The material findings upon which the Board's order must rest are:

"The record shows that the guards are interviewed for employment by the respondent and not by the United States of America, and are hired by the respondent; that their discharge is ordinarily initiated by the respondent; and that during their employment they are paid by the respondent, at rates set by
542 the respondent and not by the United States of America.

According to Chief Guard Henry A. Johnston, a witness called by the respondent in the hearing in the representation case, he is in command of all the guards at one of the plants and works 'very closely' and 'cooperates' with the respondent's representatives. Moreover, Johnston admitted that the respondent could temporarily suspend a guard from duty. Cyrus E. Wood, the respondent's personnel director, who corroborated Johnston's testimony as related above, referred to the guards at the plants involved as the respondent's employees, and further testified that the respondent makes the 'necessary pay roll deductions' before paying them their wages.

"* * * It is true that for reasons of national security the respondent may have surrendered to the military authorities many of the attributes of control which it would normally possess over its plant guards. It is clear, however, that the respondent still retains a sufficient residual measure of control over the terms and conditions of employment of the guards so that the guards should not be deprived of the rights guaranteed in the Act."

It is important in this connection to note the test which the Board utilized as a basis for its finding of the existence of the employer-employe relationship. The test includes four incidents: (1) the guards were paid by respondent; (2) they were hired by respondent; (3) they could be discharged by respondent; and (4) the control exercised by respondent.

The incident most strongly emphasized is that they were paid by respondent. Undoubtedly, this is the most important incident common to the employer-employe relationship. In the instant case, however, it is, when viewed in connection with the attending circumstances, largely minimized if not entirely obliterated. Payment of these guards by respondent, in fact their employment, was a requirement imposed by the government as a prerequisite to respondent's right to engage in the manufacture of war ma-

terial. It had no option to pay or not pay; neither did it have any option to employ or not employ. Chief Johnston, when asked why the guards were paid by respondent when their orders were received from the military authorities, stated an incontro-
543 vertible fact: "They pay because the government makes them pay." It must be assumed, so we think, that respondent was reimbursed by the government for all costs incurred in the manufacture of war material, including that of compensation paid to the guards. In reality, under such circumstances, as bearing upon the employer-employe relationship, we are of the view that it makes no difference whether they were paid by respondent or by the government.

It is also well to keep in mind that this guard force was born of the exigencies of war. None of them (with the exception of the four original watchmen) had theretofore been employed at respondent's plant. They were employed at the command of the government and the purpose of their employment was, as stated in the President's proclamation, "to protect from injury or destruction national-defense material, national-defense premises, and national-defense utilities," or, as stated in the agreement which the plant guard was required to sign with the government, "to protect war material, war premises, and war utilities against all enemies, foreign and domestic." In "Plant Protection Data Binder" dated June 7, 1943, the mission of a guard force is stated to be twofold: (a) "to provide interior and exterior protection of the plant against sabotage and espionage and natural hazards," and (b) "to serve with the Army in providing the protection to the plant and its environs in emergency situations." Again, it is stated in this Binder, "The auxiliary military police are supplementing the Army of the United States in a vital task of protecting war material and war production facilities." It appears certain not only that they were employed at the command of the government but that the services rendered by them were for the benefit of the government and the war effort. Any benefit accruing to respondent from their services was purely incidental to the primary purpose of their employment. Reliance upon payment under such circumstances is to embrace form and to ignore the realities of the situation.

The Board's finding that the guards "are hired by the respondent; that their discharge is ordinarily initiated by the respondent" is deceptive and, we think, without substantial support. It is true, as the Board found, that the guards "are interviewed for employment by the respondent." This is done by respond-
544 ent's personnel officer when the applicant is required to fill out an application blank. This service on the part of respondent is also required by the government. At the time the application for employment is made, the applicant is expressly told: "It will not be effective without the approval of the United States government." True, after the application form had been exe-

cuted, it was the custom temporarily to assign the applicant to plant control work. In the meantime, he was required by the government to sign the agreement with it, as heretofore related. This agreement stated: "The United States is approving the employment * * *." Also, as heretofore suggested, if he refused to sign this agreement, he never became a member of the military police and his dismissal was required within a reasonable time.

The application and agreement were then transmitted to the military authorities at Cincinnati and such authorities made an investigation as to the capacity, integrity and patriotism of the applicant. Such authorities had the entire responsibility of determining the applicant's fitness, even to the extent of his physical fitness. If he was accepted by the military authorities, the signed agreement with the government was returned to the applicant, together with a Plant Guard Identification Card executed by Captain Wetenhall, District Plant Guard Officer.

This card certifies: "_____ has been voluntarily and duly enrolled as an Auxiliary to the Military Police for service with the Army of the United States at _____ and is subject to Military Law for the duration of the War or until the earlier official termination by the War Department of his services as an Auxiliary to the Military Police." It is pertinent to note that this identification card which constitutes the guard's authority states in no uncertain terms that he has been enrolled "for service with the Army of the United States at _____," and, further, that he is subject "to Military Law for the duration of the War or until the earlier official termination by the War Department." Certainly this badge of authority contains not the slightest indication that the guard has been employed, hired or can be discharged by respondent.

The applicant is also furnished with the "Certificate of Enrolment," also signed by Captain Wetenhall. The phrase-
545 ology of this certificate is the same as that of the identification card. There appears in the record one of these certificates in its executed form.[1]

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[1]

United States of America
AUXILIARY MILITARY POLICE
Army of the United States
CERTIFICATE OF ENROLLMENT

This is to certify that Henry Adams Johnston has been voluntarily and duly enrolled as an Auxiliary to the Military Police with the rank of _____ for service with the Army of the United States at E. C. Atkins & Company, Indianapolis, Indiana, and is subject to Military Law for the duration of the War or until the earlier official termination by the War Department of his services as an Auxiliary to the Military Police.

For the Commanding General, Fifth Service Command:

Dated 29 June 1943.

A. C. RASMUSSEN,

Official:
B. R. WETENHALL,
Plant Guard Officer.

Upon receiving the documents just referred to, the applicant is inducted by taking the oath of allegiance to the United States and the military. This oath includes an obligation to be subject to the Articles of War. Any doubt as to when employment as a member of the military police commences is dispelled by a provision in guard order No. 3, which states: "Service will begin with the date that the plant guard was inducted * * *."

Plant Protection Data Binder dated June 7, 1943, provides:

"Each plant guard who becomes a member of the Auxiliary Military Police continues as such until he is released by the War Department from his obligations. This will take place when competent military authority has approved of his dismissal or resignation or when he has been discharged without honor."

Again, it is provided in this same Binder:

"Basically the militarization of the plant guard forces does not change the existing systems of hiring, compensation, and dismissal except as stated in paragraph 25."

Paragraph 25 provides:

"A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the ef-
546 ficiency of the plant guard force would be impaired and declines to give his approval thereto. Inasmuch as the guards are under oath to the Army, the plant management may suspend a guard without pay pending approval of his dismissal by the District Plant Guard Officer and pending the termination of the guard's enrollment as a member of the Auxiliary Military Police."

From what we have shown, we think it is conclusively established that the authority to hire and discharge was solely the prerogative of the military. True, respondent was charged by the government with receiving the application for employment and in making a recommendation. This is the sole support, if it can be characterized as such, found in this record for the Board's finding that respondent was authorized to hire. Nor do we find any support for the Board's finding that "their discharge is ordinarily initiated by the respondent." The most which can be inferred is that respondent was permitted to recommend for discharge the same as it was required to recommend for hiring.

In making this analysis of respondent's right to hire and discharge, we must note the testimony of the witness Gann, which the Board stresses. It follows:

"Q. Who hires the guard?

"A. The personnel manager and the Chief.

"Q. Who has the authority to discharge you?

"A. The personnel manager or the Chief, I would think, of E. C. Atkins and Co."

These answers by the witness merely represented his opinion and, in addition, the "Chief" referred to was Chief Johnston who,

as will be shown, was entirely under the control of the military. Putting aside, however, such considerations, a reading of Hann's entire testimony shows conclusively that he was employed in the same manner as all other guards. This is illustrated by the following questions and answers:

"Q. From the 21st of January to the 27th of January you were an employee of E. C. Atkins and Company?

"A. Yes, sir.

"Q. They pay you whether you are their employee or whether you are a military policeman, but from January 27 you be-
547 came a military policeman and were no longer an employee of E. C. Atkins and Company, as you had been up to January 27? Your status changed, did it not?

"A. That's right. I wasn't a member of the Auxiliary Military Police until I was inducted January 27."

The most favorable possible inference which can be drawn from the record is that respondent's authority, if it had any, with reference to hire and discharge was narrowly limited; in fact, as we have stated, we think it had no right in such matters except that of making recommendations to the military authorities.

This brings us to the matter of control. The Board's finding in this respect may be properly characterized as wholly impotent. It admitted that "respondent may have surrendered to the military authorities many of the attributes of control which it would normally possess over its plant guards." It found, however, that it retained "a sufficient residual measure of control." What was intended by this language is not explained. The findings are silent as to any act or conduct on the part of respondent which evidences any control. The oral testimony shows without any contradiction that all members of the plant guard at the Main Plant took their orders and instructions from Chief Johnston. (We assume that the members of the force at the Ordnance Plant likewise took their instructions from Chief Hann; at any rate, no question is raised but that the same situation existed at each plant.) The record shows with the same degree of certainty that Johnston took his instruction in toto from the military authorities. The only reference made by the Board in this respect was that Johnston "works very closely and cooperates with respondent's representatives." We should think that the exercise of ordinary common sense would require cooperation between the military and the management, but that fact certainly can form no basis for an inference that respondent exercised control. Especially is this so when the direct uncontradicted evidence is that all control was exercised by the Army. In this connection, it seems appropriate

to relate certain proportions of Johnston's testimony, and we do so in a footnote.[1]

548 The witness Gann, who testified that he was acquainted with all the duties of a guard, did not mention a single instance in which any duty was performed under the direction of respondent. On the other hand, he conceded that all duties were performed under orders received from the military. True, at one place in his testimony he was asked, "What, in general, do guards do?" and answered, "In general they guard the plant, supposed to obey all the general orders and specific orders which the company asks us to obey." Later he testified, in complete harmony with the other witnesses, that by general orders he meant those issued by the government pertaining to the service generally, and by special orders he meant those issued by the government which applied especially to respondent's plant. Then he was asked, "And when you said 'company orders' you did not mean the E. C. Atkins Company, but the military company to

549 which you belong? They are the lieutenants, the assistant chief, the chief, and then Lt. Scanlon and Capt. Wetenhall?" And he answered, "Well, that's true."

That the military had control even to the minutest detail is shown by the testimony of Gann that special orders were received from the military as to the particular gate through which certain trucks should enter the plant. Also illustrative of this absolute control is the testimony of Johnston. In response to a question as to what he would do if he found Mr. Wood tampering with machinery or personnel, he answered:

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[1] "Q. Do you take any orders from Mr. Wood who sits here in the court room and is the personnel director of E. C. Atkins and Company?
"A. Yes; naturally, I work very closely with Mr. Wood, as he is personnel director of the plant and there can be much more efficient guarding of the plant and operation of the plant if we do work closely. I have never taken an order as such from him.
"Q. You try to cooperate?
"A. I try to cooperate to the best of my ability and he does the same for me."

"Q. Now, how do you receive the general orders for your duties, from what source?
"A. General orders are received from Captain Wetenhall of the Fifth Service Command, Cincinnati."

"Q. (Referring to violation of military orders.) To whom do you report such violations?
"A. I would report any violation, any serious violation, to Captain Wetenhall of Cincinnati.
"Q. And who instructs you to enforce orders?
"A. It would be the government."

"Q. Do any of the Military Police under your command take any orders from any officer, director, or agent of the Atkins company as such?
"A. No; they wouldn't take any orders. Just like myself, they would cooperate in any way they could, but they would only——
"Q. Suppose such cooperation involved deviation from such specific order which you had to give. Would they follow your specific order or would they cooperate?
"A. They would—that would be their orders—to follow mine; yes, sir.
"Q. You would have the same reaction towards such request of cooperation as you would if you had a specific order or a general order to the contrary from one of those superiors, is that right?
"A. Yes, sir. In those orders, it says, 'No conflicting interest.' It means a little different thing there but it means a lot besides. You would follow your Government orders first. They would have a much higher priority."

"Well, in a case like that, I would just turn him in, like anybody else. I would arrest him and turn him in because I am sworn to do that. I have sworn an oath.

"Q. Would you do the same with the president of the company?

"A. Yes, sir; I would.

"Q. And you own no responsibility to the president or any director of the company which would make you violate your oath to the Military?

"A. No, sir; there is no reason for that."

Johnston also identified three forms of passes which were issued to various employes, one for admission from the outside into the armor plate division, another for admission into the same division by an employe entering from another department, and another known as a gate pass, which permitted the entering and departure from a gate. No employe could enter a gate or a building until he had exhibited to a member of the guard the appropriate pass. Even an executive of the company could not enter a gate or go from one building to another without exhibiting his pass to a guard. These were military orders.

The statement in the Board's findings that respondent's personnel director "referred to the guards at the plants involved as respondent's employees" is also without substance. It is based solely upon the following questions and answers:

"Q. How many of your employees at the main plant are plant guards or Auxiliary Military Police?

"A. Thirty-two.

"Q. When you say your employees, they are your
550 employees only in the sense that you pay their wages, is that right?

"A. That is correct.

"Q. And you make the necessary pay roll deductions?

"A. That's right."

We think the conclusion is inescapable that the Board's findings based upon proof as to what actually happened is without substantial support. The proof shows without contradiction that respondent (1) paid the guards, but under the circumstances heretofore related, (2) had nothing to do with hiring and discharging other than making recommendations as to the former, and (3) exercised no control. True, the Board intimates that respondent failed to exercise the authority which it had, and stresses certain provisions in the documentary evidence which perhaps lend some color to the suggestion. We are of the view, however, that the employer-employe relationship must be determined from the actual situation as disclosed by the proof rather than from what the situation might have been. In this connection, we observe that the Board has called to our attention a number of its own decisions wherein it has decided that plant guards are employes.

Some of these cases we have studied, and we think the facts, especially as disclosed by the oral testimony on the matter of control exercised by the company, are quite different from those shown here. We are further of the view that this case must be decided on the facts contained in the record before us and not on the Board's decisions in other cases on different facts.

While we have heretofore made numerous references to the documentary proof, we think that it is entitled to further consideration. It is plain from the record that both respondent and the guard members formulated their activities largely upon the instructions contained in guard orders 1, 2, and 3. It is doubtful, at any rate there is nothing in the record to disclose, that they were even aware of some of the documents which the Board now relies upon and especially Circular No. 15, issued by the War Department March 17, 1943. (This Circular, as heretofore noted, was not introduced in evidence.) The guard orders were posted in various places at the two plants and were the orders under
551 which the guards actually worked. The importance attached to these orders is shown from the fact that they were blown up in photostatic replicas, "enlarged four times," that the plant guards could familiarize themselves with their provisions.

Guard order No. 1 had underlined for particular emphasis the following sentence: "No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission." There is not a word in such order which intimates other than that the guard members are entirely under the jurisdiction and authority of the military. They are told that they are subject to the Articles of War and court martial; that a commissioned officer of the United States Army has been placed in command, that the mission of the guard force is to provide protection for the plant, that a member is available for military use whether on or off duty, that protection of the plant and its production is essential to the successful prosecution of the war; that service begins with the date he is inducted into the military police, and that no member may resign without the written approval of the District Plant Guard Officer.

Guard order No. 2 states eighteen general orders which the member is required to be prepared to recite when directed by his superior officers. A comparison of these guard orders with the Basic Field Manual or Soldiers' Handbook, edition of July 23, 1941, issued by the War Department, shows that the duties, responsibility and discipline of a plant guard member is as strict as that imposed in any branch of the military service.

Guard order No. 3 authorizes the wearing of service stripes in accordance with Army regulation for services faithfully performed, and provides that "service will begin with the date that the plant guard was inducted into the Auxiliary Military Police."

The Board places strong reliance upon certain provisions contained in Circular No. 15 of the War Department, dated March 17, 1943. This document occupies twenty full pages of the Board's brief. A cursory reading of certain statements contained in this document seem to indicate that respondent had some measure of authority over members of the plant guard. Even if this be so, however, as we have heretofore shown, all authority and control was taken over by the Army and none was exercised by
552 respondent. Furthermore, we are of the view that this document when considered as a whole, and especially when considered in connection with other documents to which we have referred, leaves little room for the contention that respondent had the right but failed to exercise control.

We shall refer to a few of the more striking statements relied upon by the Board. The document states:

"Nothing in this circular will be construed as modifying the responsibility of plant management 'for providing adequate protection at all times against all hazards.'"

Certainly this statement constitutes no proof that respondent actually exercised any control of the plant guards or even that it had any right to exercise such control. Moreover, immediately following the statement just quoted, the plant guard officer is authorized to take appropriate action to correct any defective or inadequate performance "by the guard force of its ordinary protective duties." The document states:

"The mission of this guard force is to provide protection for this plant. In addition to its normal functions the force or any member thereof whether on or off duty is available for military use in any emergency * * *. No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission."

We are unable to discern any assistance in this statement for the Board's theory. It appears certain that the protection for the plant referred to is that which the government requires in behalf of the war effort. The statement recognizes that whether services rendered be normal or of an emergency character, they are rendered as members of the force. Another statement relied upon: "The Auxiliary Military Police will continue to function as formerly * * *. Control, therefore, will be exercised as heretofore through the plant management." This statement is also meaningless, in view of the fact that no plant guard system had theretofore been in existence at respondent's plant. Furthermore, as already shown, actual control of the guard force was taken over by the military.

Another provision emphasized by the Board is:

"Basically, the militarization of plant guard forces
553 does not change the existing systems of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant managements."

The interpretation which the Board places upon this statement is immediately dispelled by the sentence which follows:

"A member of the Auxiliary Military Police may not be employed or dismissed and may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant's guard force would be impaired and declines to give his approval thereto."

How it can be said that respondent had the right to hire and dismiss when that prerogative was placed squarely in the Army is a theory we are unable to follow. In this connection, it is pertinent to note that this document also provides:

"The Auxiliary Military Police, as agents of the Federal Government, will not be subject to any state or municipal requirement which conflicts with their war-time duties."

We now refer to certain provisions of Circular No. 15 which really constitute the backbone of the Board's argument that members of the plant guard are employees of respondent and entitled to collective bargaining. It is provided:

"The status of the employer in respect to the employee benefits for the guard force is not changed. For example, social security, workmen's compensation, and employers' liability provisions remain unaffected."

Also:

"Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police. * * * If any proposed labor agreement is being considered which involves plant protection employees who are or may become members of the Auxiliary Military Police, the contracting parties will be urged to insert in such agreement a provision substantially as follows: 'It is understood that for the duration of the war this agreement is in all respects subject to the provisions of the directives of the War Department concerning military
554 organization of the plant guard forces * * * and that nothing contained in this agreement will be construed in any way to interfere with the organization, efficiency, training, and control by the War Department of the company guard force as an Auxiliary to the Military Police, nor to abrogate or interfere with the duties, responsibilities, and rights imposed by the War Department upon any employee in such Auxiliary Military Police.'"

We suppose that these provisions represent an effort on the part of the War Department to preserve, in the instant situation to create, the status of employer-employe relationship between members of the plant guard and respondent. It attempted to counteract the emasculating effect which its orders and directives had had upon the ordinary incidents attending such relationship. In our judgment, these provisions weaken rather than strengthen the position of the Board. The War Department, acting under the authority of the President's proclamation, created this guard

force. In doing so, it stripped the respondent and denuded members of the force of all the attributes common to the employer-employe relationship. Having created this situation, we think it was without authority to revitalize that which it had destroyed.

These provisions may indicate a willingness or even a desire on the part of the War Department that plant guards retain their status as employes, but even so, such desire cannot determine or alter the legal rights of the parties. Furthermore, the right to bargain is limited, if not destroyed, by the condition "but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police." This gratuity on the part of the War Department is on a par with that extended to a boy when he is given permission to swim, providing he stays away from the water. The requirement that "for the duration of the war" any agreement between plant guards and the plant must be subject to the directives of the War Department and will not interfere in any way with the duties and responsibilities imposed by the War Department is, in effect, the postponement of the right to bargain, as contemplated by the Act, until some future time.

The Board found, apparently in response to a contention
555 made by respondent, that the plant guards are not employes of the United States of America. From this it argues that because they are not employes of the government they must be those of respondent. We are not impressed with this argument. Neither do we think it is necessary for us to determine the technical status which they occupy with the federal government. That they sustain a relationship closely akin to that of a soldier cannot be doubted. The Certificate of Enrollment issued by the War Department provides that the applicant "has been voluntarily and duly enrolled as an Auxiliary to the Military Police with the rank of ---------- for service with the Army of the United States at E. C. Atkins and Company." Thus they are enrolled "for service with the Army." Moreover, the War Department itself in Circular No. 15, as already noted, designates them as "agents of the federal government." Irrespective, however, of their technical classification, there can be no doubt but that they are representatives of the federal government for the duration of the war and engaged in a service necessary for its successful prosecution. In our view, the relation which they sustain to the federal government is wholly incompatible with the theory that they are employes of respondent within the meaning and purpose of the National Labor Relations Act. We hold accordingly.

The further question, closely related to the one we have just decided, is whether the Board's order requiring respondent to bargain with the Union should be enforced. In considering this question, we assume, contrary to our holding, that members of the military guard are employes of respondent.

The purposes and policy of the National Labor Relations Act are well known and need not here be dwelt upon. The Board must

comply with the requirement "that the unit selected must be one to effectuate the policy of the Act, the policy of efficient collective bargaining." The capacity in which the Board acts is succinctly stated in National Licorice Co. v. N. L. R. B., 309 U. S. 350, 362:

"The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining and by protecting the exercise by workers of full freedom of asso-
556 ciation, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment. * * *."

See also Amalgamated Utility Workers v. Consolidated Edison Co., 309 U. S. 261, 265.

There is no room for argument but that any field open for bargaining between the Union and respondent is an extremely limited one. This must have been fully recognized by the War Department when it included in Circular No. 15 heretofore discussed the admonition that "no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police." As already pointed out, the Act contemplates "full freedom" on the part of the employes, with the right of "efficient collective bargaining." It is difficult to understand in view of the policy stated, how the right to bargain, not fully and efficiently but only in some limited fashion, can be contemplated by the Act.

A more cogent reason, however, why enforcement should not be allowed is that to do so would be or is likely to be inimical to the public welfare. The Board in its order entirely ignores the unusual status occupied by members of the plant guard by reason of their enrollment for service with the military. As heretofore shown, they are largely if not entirely under the control and direction of the War Department. They wear the uniform of a soldier, owe the same allegiance, receive their authority and commands from the same source, are enlisted for the duration of the war for service with the Army, and are engaged in the performance of a service essential to the successful prosecution of the war. Pertinent is the statement in Southern Steamship Co. v. N. L. R. B., 316 U. S. 31, 47:

"It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."

In the recent cases of N. L. R. B. v. Jones and Laughlin Steel Corp. and N. L. R. B. v. Federal Motor Truck Co., decided December 8, 1944 (Circuit Court of Appeals, 6th Circuit), the court in denying enforcement orders under a situation similar to that of the instant case said:

"The national welfare is of supreme importance and
557 especially is this true in time of war. The evidence reflects the deep concern of the Government for the maintenance and protection of respondents' plants and for the integrity and volume of their products. * * * It must be kept in mind that in time of national peril, the preservation, protection and promotion of the national welfare is the paramount objective; and the Board must select bargaining agents with this in view."

We agree with the statement just quoted. Nothing should be permitted which will interfere in any degree or to any extent with the obligation which these guards have with the military. Membership in a union with the right to bargain might, in fact is likely to, do that very thing. To so state is not to cast any reflection upon the patriotism of the guard members. It is merely a recognition of that which is a matter of common knowledge.

In concluding, it is pertinent to observe that the enforcement of this order would be little more than an idle gesture. It is difficult to see how it could be of any practical benefit, and it might do immeasurable harm to the war effort and consequently to the public interest. The petition for enforcement is denied.

KERNER, Circuit Judge, concurs in the result.

558 In United States Circuit Court of Appeals,
Seventh Circuit

8669

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

E. C. ATKINS AND COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Order denying petition for enforcement

February 27, 1945

This cause came on to be heard on the transcript of the record from The National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the petition of the National Labor Relations Board for enforcement of its order entered in this cause on May 30, 1944, be, and the same is hereby, denied.

559 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1945

Supreme Court of the United States

No. 419, October Term, 1946

Order allowing certiorari

Filed December 23, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

730640—47

U. S. GOVERNMENT PRINTING OFFICE: 1947

Nos. 418, 419

In the Supreme Court of the United States

OCTOBER TERM, 1946

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JONES & LAUGHLIN STEEL CORPORATION

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E. C. ATKINS AND COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE SIXTH AND SEVENTH CIRCUITS

INDEX

	Page
Opinions below	2
Jurisdiction	3
Questions presented	3
Statute involved	5
Statement	5
Specification of errors to be urged	18
Reasons for granting the writs	21
Conclusion	38
Appendix A: Pertinent provisions of the Act	39
Appendix B: War Department regulations re auxiliary police	44

CITATIONS

Cases:

Associated Press v. *N. L. R. B.*, 301 U. S. 103	34
Bethlehem-Fairfield Shipyard, Inc., Matter of, 61 N. L. R. B. 901	35
Brewster Aeronautical Corp., 11 War Labor Rep. 286	22
Budd Wheel Co., Matter of, 52 N. L. R. B. 666	22, 33, 34
Carroll v. *Social Security Board*, 128 F. 2d 876	25
Chrysler Corporation, Matter of, 44 N. L. R. B. 881	22, 32, 33, 34
Curtiss Bay Towing Co., Matter of, 66 N. L. R. B. 1152	36
Detroit Steel Products Co., 6 War Labor Rep. 495	22
Dravo Corporation, Matter of, 52 N. L. R. B. 322	22, 32, 33
Frick Co., Matter of, 63 N. L. R. B. 837	35
Godchaux Sugars, Inc., Matter of, 44 N. L. R. B. 874	31
Great American Industries, 11 War Labor Rep. 287	22
Hill v. *Florida*, 325 U. S. 538	31
Jones & Laughlin Steel Corporation, Matter of, 66 N. L. R. B. 368	31, 36
Marshall Field & Co. v. *N. L. R. B.*, 318 U. S. 253	29
N. L. R. B. v. *Carroll*, 120 F. 2d 457	24
N. L. R. B. v. *Cheney California Lumber Co.*, 326 U. S. 706	29
N. L. R. B. v. *Condenser Corp.*, 128 F. 2d 67	34
N. L. R. B. v. *Hearst Publications, Inc.*, 322 U. S. 111	23, 24, 25
N. L. R. B. v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241	26
N. L. R. B. v. *Packard Motorcar Company*, decided August 12, 1946, C. C. A. 6	36
New Orleans-Belize S. S. Co. v. *United States*, 239 U. S. 202	24

711295—46——1

Cases—Continued. Page

Phelps Dodge Copper Products Corp., Matter of, 41 N. L. R. B. 973 29
Pittsburgh Plate Glass Co. v. *N. L. R. B.* 313 U. S. 146 32
Rockbestos Products Co., Matter of, 47 N. L. R. B. 1312 35
Standard Oil Co. v. *Anderson*, 212 U. S. 215 24
Standard Oil Co. v. *Johnson*, 316 U. S. 481 5
Standard Steel Spring Co., Matter of, 62 N. L. R. B. 650 35
Texas Co., Matter of, 67 N. L. R. B., No. 59 36
Virginia Electric & Power Corp., Matter of, 68 N. L. R. B., No. 72 36
Walling v. *Lum*, 7 Wage Hour Reporter 570 22
Williams Oil-O-Matic Division of Eureka-Williams Corp., Matter of, 67 N. L. R. B., No. 140 36
Youngstown Sheet & Tube Co., 15 War Labor Rept. 500 22

Statute:

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et. seq.*) 5
Sec. 1 ..... 23, 31, 39
Sec. 2 40
Sec. 7 41
Sec. 8 ..... 6, 41
Sec. 9 41
Sec. 10 ..... 26, 28, 30, 42

Miscellaneous:

Circular No. 15, Hq. A. S. F., War Dept., March 17, 1943 ..... 8, 9, 10, 11, 12, 13, 44
Executive Order No. 8972, dated December 12, 1941 (6 Fed. Reg. 6420) 5
Letter, A. G. O., July 2, 1942, Military Organization of Plant Guard Forces 8, 67
National Labor Relations Board, Seventh Annual Report (1943), p. 63 22
National Labor Relations Board, Eighth Annual Report (1944), p. 57 22
Restatement of the Law of Agency, Ch. 7, Sec. 227 (b) 25

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 418

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JONES & LAUGHLIN STEEL CORPORATION

No. 419

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E. C. ATKINS AND COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE SIXTH AND SEVENTH CIRCUITS

The Solicitor General, on behalf of the National Labor Relations Board, prays that writs of certiorari issue to review a decree of the United States Circuit Court of Appeals for the Sixth Circuit entered on April 4, 1946 (*Jones*, R. 118)[1]

[1] Record references relating to the two respondents herein will appear as follows: Jones & Laughlin Steel Corporation (*Jones*, R. —); E. C. Atkins and Company (*Atkins*, R. —).

setting aside an order of the Board issued against Jones & Laughlin Steel Corporation, and a decree of the United States Circuit Court of Appeals for the Seventh Circuit entered on May 31, 1946 (*Atkins*, R. 322), setting aside an order of the Board issued against E. C. Atkins and Company.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Sixth Circuit in the *Jones & Laughlin* case (*Jones*, R. 119–122), is reported in 154 F. 2d 932. The opinion of the Circuit Court of Appeals for the Seventh Circuit in the *Atkins* case (*Atkins*, R. 320–322), is as yet unreported. The original opinions of the circuit courts of appeals in the *Jones & Laughlin* (R. 83–89) and *Atkins* (R. 348–366) cases are reported, respectively, in 146 F. 2d 718, and 147 F. 2d 730. The order of this Court granting writs of certiorari, vacating prior judgments entered by the courts below, and remanding the cases for further consideration is reported in 325 U. S. 838. The findings of fact, conclusions of law, and orders of the Board in these two cases (*Jones*, R. 61–68, 73–74; *Atkins*, R. 30–42) are reported in 53 N. L. R. B. 1046 and 56 N. L. R. B. 1056, respectively. The decisions of the Board in prior representation proceedings which form part of the record in these cases (*Jones*, R. 52–55; *Atkins*, R. 5–8), are re-

ported in 49 N. L. R. B. 390 and 52 N. L. R. B. 1470, respectively.

JURISDICTION

The decree of the Circuit Court of Appeals for the Sixth Circuit in the *Jones & Laughlin* case was entered on April 4, 1946 (*Jones*, R. 118). The petition for rehearing filed by the Board was denied on May 20, 1946 (*Jones*, R. 134). The decree of the Circuit Court of Appeals for the Seventh Circuit in the *Atkins* case was entered on May 31, 1946 (*Atkins*, R. 322). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. The question presented by the *Atkins* case is whether persons who are employed to guard the property of a private employer, who are compensated by that private employer at rates fixed by him, and who are also civilian auxiliaries to the military police of the Army of the United States, are "employees" within the meaning of Section 2 (3) of the National Labor Relations Act.[2]

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[2] The Circuit Court of Appeals for the Seventh Circuit substituted for the Board's findings of fact concerning the incidents of the economic relation between the plant guards and the company, findings of its own. One glaring example

2. The questions presented by the *Jones & Laughlin* case are whether, in the light of Section 10 (e) of the Act, the court below could properly consider:

(a) the effect the plant guards' deputization by local police authorities upon their collective bargaining rights, no facts concerning such deputization having been presented to the Board.

(b) whether the Board erred in not restricting the freedom of choice of militarized and deputized plant guards to organizations not representing rank and file employees, no objection on this ground having been raised before the Board.

3. Assuming that these matters could properly have been considered by the court below, a further question presented is whether the Board, in the exercise of its administrative discretion, may properly require an employer to bargain collectively with a labor organization as the representa-

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of the error into which the court fell in so doing is its holding that the Atkins Company was a cost-plus-a-fixed-fee contractor whose labor costs were borne by the Government (*Atkins*, R. 355). The record plainly shows that this was not a fact (*Atkins*, R. 31, 332–333, 326–327) and the inferences as to employer-employee relationship drawn from this supposed fact by the court below must, therefore, fall.

Since we believe that the court below erred in substituting its findings for those of the Board, the case thus presents, in addition, the question whether the Board's findings of fact are supported by substantial evidence. This question need not necessarily be decided, however, since it is our position that even on the facts as found by the court, the Board's order should be enforced.

tive of the employer's plant protection employees, when those employees are members of the civilian auxiliary to the military police of the Army of the United States, or when they are deputized by local police authorities, if the labor organization which represents them also represents a bargaining unit composed of the employer's maintenance and production employees.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are set forth in Appendix A, *infra*, pp. 39–43. The pertinent regulations of the War Department relating to the guard force of the civilian auxiliary to the military police, established pursuant to Executive Order No. 8972, dated December 12, 1941 (6 Fed. Reg. 6420) are set forth in Appendix B, *infra*, pp. 44–71.[3]

STATEMENT

The formal proceedings in both of these cases followed an identical pattern. In each case, following the usual proceedings under Section 9 (*c*) of the Act, the Board issued a decision and di-

[3] The Circuit Court of Appeals for the Seventh Circuit correctly held in the *Atkins* case that these War Department regulations are public documents of which the Board and the courts may take judicial notice (*Atkins*, R. 353, n. 1). Cf. *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 483–484.

rection of election finding that the plant protection employees involved were "employees" within the meaning of the Act, that they constituted an apropriate bargaining unit, and that they were entitled to the collective bargaining rights guaranteed by the Act, despite the fact that they were civilian auxiliaries to the military police (*Jones,* R. 52–55; *Atkins,* R. 5–8). The petitioning union in each case was selected by a majority of the eligible employees in the election and was certified by the Board as the representative of the plant protection employees (*Jones,* 34–35; *Atkins,* R. 17).

Thereafter, in proceedings under Section 10 (c) of the Act, the Board issued decisions in which it found that each of the respondents had refused to bargain collectively with the certified representative of its plant protection employees, thereby engaging in unfair labor practices within the meaning of Section 8 (5) and (1) of the Act (*Jones,* R. 73–74; 61–68; *Atkins,* R. 30–42). The Board ordered each respondent to cease and desist from refusing to bargain with the named representative of its plant protection employees; to cease and desist from engaging in any like or related acts or conduct interfering with, restraining or coercing the employees; upon request to bargain collectively with such representative; and to post appropriate notices (*Jones,* R. 73–74; *Atkins,* R. 32–33).

The evidence in support of the Board's findings, in each of these cases, that the plant protection employees herein, despite their membership in the civilian auxiliary to the military police, were "employees" within the meaning of the Act, and entitled to exercise the bargaining rights guaranteed thereby may be summarized as follows:

In December 1943, when its refusal to bargain occurred (*Atkins*, R. 39), respondent, E. C. Atkins and Company, an Indiana corporation, was engaged in the manufacture of saws, tools, and armor plate at the two plants here involved, located in Indianapolis, Indiana (*Atkins*, R. 36–37, 276–278).[4] These products were sold to jobbers, dealers, subcontractors, and direct to manufacturing consumers, as well as to the United States Government (*Atkins*, R. 277). In June 1943, when its refusal to bargain occurred (*Jones*, R. 64–65), respondent Jones & Laughlin Steel Corporation, a Pennsylvania corporation, was engaged in the production of ingot steel for the national war effort at its Otis Works, located in Cleveland, Ohio, the plant here involved (*Jones*, R. 52–53, 63, 3–4, 43–44). At the time the refusals to bargain occurred, the plant-protection employees at the plants of both companies were

[4] One of the two plants had been owned and operated by the company since 1857; the other plant, known as the "Fall Creek Ordnance Plant," was owned by the United States Government but operated by the Company (*Atkins*, R. 277).

members of the civilian auxiliary to the military police (*Jones*, R. 53, 6–7, 8; *Atkins*, R. 7, 31; 45–46, 52, 68–69, 85–86, 277–278) a guard force established by the War Department on July 2, 1942 (Appendix B, *infra*, pp. 67–71) as a security precaution for the protection of strategic premises and materials important to the prosecution of the war.

On March 17, 1943, the War Department issued regulations defining the purpose of the civilian auxiliary to the military police and the duties, obligations, and employment status of plant-protection employees who became members thereof (Appendix B, *infra*, pp. 44–67). Under these regulations, the stated purpose and basic duty of such a plant-protection force is "to provide internal and external protection of the plant against sabotage, espionage, and natural hazards [and] to serve with the Army in providing protection to the plant and its environs in emergency situations" (Appendix B, *infra*, p. 46). Within the scope of this broad assignment, the specific functions of the guards in the instant cases did not vary materially from plant to plant. They were required generally to watch the plant gates and identify employees entering or leaving the plant, quell disturbances in and around the plant, enforce plant safety rules, keep a lookout for fire hazards, and in short to police the plant premises with a view to preventing destruction of

property and interruption of production (*Jones*, R. 6, 8–9; *Atkins*, R. 52–53, 80, 88).

At the time the guards were made members of the civilian auxiliary to the military police, they were required, in accordance with the War Department regulations (Appendix B, *infra*, pp. 52–53, 69–71), to enter into a written agreement with, and give a pledge of loyalty to, the United States (*Jones*, R. 53, 6–8; *Atkins*, R. 31; 54–57, 103–104). The regulations also subjected the guards to certain of the Articles of War (Appendix B, *infra*, pp. 50–54, 68) and required them to undergo not more than one hour a week of military training (Appendix B, *infra*, pp. 62–63).[3] The plant guard forces in the instant cases received one hour a week of military training (*Jones*, R. 6–7; *Atkins*, R. 57, 79).

Subject to the proviso that a member of the civilian auxiliary to the military police "may not be employed or dismissed and may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant's guard force would be impaired and declines to give his approval thereto" the War Department regulations provide that "militarization of plant guard forces does not change the

[3] The regulations provide that military training may exceed one hour per week only with the approval of the plant management (Appendix B, *infra*, p. 62); this is because the private employer must compensate the guards for time spent in such training.

existing systems of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant managements [and] guards in the employ of a private employer may, as heretofore, be dismissed by that employer * * *" (Appendix B, *infra*, pp. 54–55). In the instant cases, the guards were hired through the companies' regular employment channels and were thereafter, upon approval by the military authorities, sworn into membership in the civilian auxiliary to the military police (*Jones*, R. 53–54; 4–14; *Atkins*, R. 31; 52–53, 68–71, 82–83, 91–92). The employer could discharge a guard from its employ subject to the same limited veto available to the military in the case of a company's hiring of a guard (*Jones*, R. 53–54; 9; *Atkins*, R. 31; 53–54, 72, 81, 84). Guards employed by respondent Jones & Laughlin prior to the militarization of the company's guard force were retained by the company after militarization, and became members of the civilian auxiliary to the military police, upon approval by the military (*Jones*, R. 9–10).[¶]

The companies carried the guards upon their regular pay rolls, unilaterally determined their

[¶]Respondent Atkins recruited the bulk of its guard force after the militarization program went into effect (*Atkins*, R. 52, 54, 68, 85, 88). The watchmen who had been employed by the company prior to the effective date of the program, however, were sworn in as civilian auxiliaries to the military police and remained on their jobs (*Atkins*, R. 88).

rate of compensation, and paid their wages; after making appropriate payroll deductions (*Jones*, R. 53–54; 9, 14; *Atkins*, R. 31, 53–54, 82, 85, 93).[1] The War Department regulationss preserved to the plant guards a status indistinguishable from other employees of a company insofar as they were affected by "employee benefits" such as "social security, workmen's compensation, and employer's liability" under insurance policies covering the company's employees generally (Appendix B, *infra*, p. 57; *Jones*, R. 53; 14). In accordance with the regulations of the War Department (Appendix B, *infra*, pp. 58–59, 60–61), the companies furnished the guards with uniforms and arms (*Jones*, R. 8; *Atkins*, R. 52–78).

The War Department regulations provide that "control" of members of the civilian auxiliary to the military police "will be exercised * * * through the plant management except at drill and except in emergency situations," and that "although the plant guard officers will be in command at all times, they will not supplant the civilian guard officers, and unless expediency demands otherwise will exercise their authority through the chain of command established by the

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[1] In the *Atkins* case, the record is clear that the cost of the guards' wages was borne by the company and not by the United States Government; the company did not operate on "a cost-plus basis" (*Atkins*, R. 332–333, 326–327).

plant management" (Appendix, *infra*, p. 54).[8] In both of the instant cases, the guard force was under the immediate supervision of a chief guard and his lieutenants, all of whom were civilians (*Jones*, R. 53; 8–10; *Atkins*, R. 31; 68–71, 77–79, 81–82). The hours of work and work assignments of the individual guards were determined by civilian authority (*ibid.*). In the *Atkins* case, the chief guard without, so far as appears, even notifying or consulting the military authorities, established a system of rotating shifts for the guard force (*Atkins*, R. 78–79). Likewise, guards were promoted to supervisory positions on the guard force, at increased wages, upon recommendations made to the company by the chief guard, without informing the military authorities (*Atkins*, R. 82).

As to "labor relationships", the War Department regulations provide that "Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police. * * * The Auxiliary Military Police should be represented in collective bargaining with the management by a bargaining unit other than that composed of the production and maintenance workers, although

[8] The regulations further provide that "at civilian-operated plants", orders will be issued by the military authorities to the plant guards "only after consultation with and, if possible, concurrence by the plant management" (Appendix B, *infra*, p. 53).

both bargaining units may be affiliated with the same labor organization" (Appendix B, *infra*, p. 58). To clarify this provision of its regulations the War Department, on July 10, 1943, issued a memorandum interpreting "the same labor organization" to mean "the same trade union local" (*Jones*, R. 100–101).

In the *Jones & Laughlin* case, the same union which represented and sought to bargain for the guards also represented the employers' production and maintenance employees but in separate and distinct bargaining units.[9] In the *Atkins* case the plant protection employees were represented by a different union from the other employees.[10]

Upon the basis of the War Department regulations, the evidence adduced, and in accordance with its established administrative policy with

[9] Although at the time of the hearing before the Board a separate local had not been established for the unit of plant protection employees (*Jones*, R. 1, 49–50, 55–56), following the close of the hearing, the Board was advised by its regional director, and in turn advised the court below (*Jones*, R. 92), that the union involved, the United Steelworkers of America, had chartered a separate local for the plant protection employees involved in that case.

[10] The guards in the *Atkins* case were represented by Plant Protection Lodge No. 1683, affiliated with International Association of Machinists, District 90 (A. F. of L.), while the Company's production and maintenance employees, with the exception of sawsmiths, were represented by the United Steelworkers of America (C. I. O.). The sawsmiths were represented by Sawsmith's Local Union No. 18,548 (A. F. of L.) (*Atkins*, R. 85–88, 162–173, 304–305).

respect to militarized plant guards (*infra*, pp. 21–26), the Board found that the militarized guards in each of the cases at bar were "employees" within the meaning of the Act and entitled to the collective bargaining rights guaranteed thereby (*Jones*, R. 73, 53–54; *Atkins*, R. 31–32, 7). Additionally, in the *Jones & Laughlin* case, although respondent had not contended that if the guards were to be deemed "employees" within the meaning of the Act, they should nevertheless be denied the right to select as collective bargaining representative a union which also represented a separate bargaining unit of production and maintenance employees of the same employer, the Board noted in its decision, as it had often noted in earlier cases, that there was nothing in the War Department regulations or in the duties or obligations of the militarized guards which made it inappropriate for them to bargain collectively through such a union (*Jones*, R. 73, 53–54).

Petitions for enforcement of its orders, filed by the board in the courts below (*Jones*, R. 76–78; *Atkins*, R. 337–339), were denied. The Circuit Court of Appeals for the Sixth Circuit held, in the *Jones & Laughlin* case, that the militarized guards were employees within the meaning of the Act.[11] The court went further, however, and

[11] The court also upheld the Board's determination that the guards were not "supervisory" employees (*Jones*, R. 84–85). That question was not raised in the *Atkins* case.

despite the fact that no such objection had been urged before the Board, held that it would be against public policy in time of war to require an employer to bargain with a union as the representative of its militarized plant protection employees when that union also represents, though in a separate unit, other employees of the same employer (*Jones*, R. 83–89). In the *Atkins* case, the Circuit Court of Appeals for the Seventh Circuit refused to enforce the Board's order primarily on the ground that the militarized guards were not "employees" within the meaning of the Act (*Atkins*, R. 348–366).

The Board filed a petition for writs of certiorari to review these adverse decisions (Nos. 1237 and 1238, October Term, 1944). In its petition the Board noted, *inter alia*, as it had in its petition for rehearing in the *Jones & Laughlin* case in the court below (*Jones*, R. 93, n. 6), that, following the refusals to bargain, the guard forces involved had been demilitarized. (Petition for Writs of Certiorari, Nos. 1237 and 1238, October Term, 1944, p. 27). The Board urged that this fact should not be regarded as rendering moot either the Board's order or the question of the effect of militarization upon the employee status of the guards, since the guards were militarized at the time the refusals to bargain occurred, and

unless the employers were then bound to bargain with the representatives of the guards, there were no unfair labor practices and the Board's orders were invalid (*id.* at p. 28). The Board further suggested that the only effect of the demilitarization was to deprive the employers of the future use of militarization as a defense for refusing to bargain. This Court granted writs of certiorari, vacated the judgments below, and remanded the cases to the respective circuit courts of appeals "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved and the effect thereof on the Board's orders." 325 U. S. 838.

Pursuant to the remand, the parties entered into stipulations respecting the dates and circumstances of the demilitarization of the guards at the plants of the respective respondents. Included also in the stipulations, though clearly beyond the terms of the remand and the issues open under it, were facts showing that the plant guards of respondent Jones & Laughlin Steel Corporation were, at all times relevant to these proceedings, commissioned as private policemen of the City of Cleveland, and exercised "the legal powers of peace officers in their work as plant guards" (*Jones*, R. 114–118); and that the plant guards of respondent E. C. Atkins and Company

had been "sworn in as Deputy Policemen by the City of Indianapolis." (*Atkins*, Stip. p. 11).[12]

The Board thereafter filed motions for decrees enforcing its orders in both cases, which were denied (*Jones*, R. 112–114, 119–122; *Atkins*, R. 320–322). In the *Atkins* case, the Circuit Court of Appeals for the Seventh Circuit held that "the facts relative to the changed status of the plant guards by reason of their demilitarization * * * are irrelevant to * * * our decision that the plant guards were not [at the time of the refusal to bargain] employees of respondent within the meaning of the Act" (*Atkins*, R. 321), and reaffirmed that holding. In the *Jones & Laughlin* case, the Circuit Court of Appeals for the Sixth Circuit held that not only the facts concerning demilitarization, but also the facts relating to the deputization of the guards which were embodied in the stipulation (*Jones*, R. 114–118), were to be considered as though they "had been presented at the hearing before the Board" (*Jones*, R. 120). The court held that the guards were "employees" within the meaning of the Act, but concluded that in view of the "drastic police powers" exercised by the guards, as shown by the stipulation, it was "improper for the Board to permit their

[12] The stipulations clearly reserved the right of all parties to contend that any of the facts contained therein are irrelevant to the issues in the proceedings (*Jones*, R. 114; *Atkins*, p. 12 of Stip.).

organization by the same union which represents the production employees" (*Jones*, R. 121).

SPECIFICATION OF ERRORS TO BE URGED

In the *Atkins* case, the Circuit Court of Appeals for the Seventh Circuit erred:

1. In holding that guards who are members of the civilian auxiliary to the military police are not employees within the meaning of the Act.

2. In holding that the Board's findings of fact concerning the economic relation between the guards and E. C. Atkins and Company are not supported by substantial evidence.

3. In holding that "since 1941, respondent has been engaged exclusively in the manufacture of armor-plate for the federal government."

4. In holding that "respondent was reimbursed by the government for all costs accrued in the manufacture of war material, including that of compensation paid to the guards."

5. In holding that "it makes no difference whether they [the militarized guards] were paid by respondent or by the government."

6. In holding that the authority to hire and discharge a militarized guard was solely the prerogative of the military, and that respondent's authority was limited to making recommendations for such action.

7. In holding that the War Department regulations leave "little room for the contention that

respondent had the right but failed to exercise control" over the militarized guards and that "all authority and control was taken over by the Army and none was exercised by respondent."

8. In holding that a producer of war materials for the United States Government, whose labor costs are reimbursed by the Government, cannot be found to be an employer within the meaning of the Act.

9. In failing to give any weight to the Board's determination based on its settled policy that, despite their militarization, plant guards are employees of respondent within the meaning of the Act and are entitled to exercise the collective bargaining rights guaranteed by the Act, and in substituting its own inferences and judgment for those of the Board with respect to the guards' employment status.

10. In setting aside and denying enforcement to the Board's order.

In the *Jones & Laughlin* case the Circuit Court of Appeals for the Sixth Circuit erred:

1. In considering facts concerning the private police status of the guards which were never presented to the Board.

2. In passing upon the question whether because of their militarization and deputization, the plant guards should be permitted to bargain through a labor organization also representing a separate unit of the employer's production and

maintenance employees, no such question having been raised before the Board.

3. In holding that it would not effectuate the policies of the Act and would be against the public interest, to permit an employer's plant protection employees, who constitute an appropriate bargaining unit, ~~and who~~ are members of the civilian auxiliary to the military police, and who are deputized as police officers by local authorities, to bargain collectively with the employer through a union which also represents a separate bargaining unit of other employees of the same employer.

4. In failing to give any weight to the Board's determination and settled administrative policy that the bargaining pattern described in the preceding paragraph effectuates the policies of the Act and in substituting its own judgment for that of the Board with respect to the propriety of such bargaining pattern.

5. In holding that, under Section 9 (b) of the Act, the Board is empowered to decide whether a union selected by a majority of employees is "appropriate."

6. In Holding that the Board failed to give adequate consideration to the public interest in view of the war.

7. In setting aside and denying enforcement to the Board's order."

REASONS FOR GRANTING THE WRITS

1. The decision of the Circuit Court of Appeals for the Seventh Circuit in the *Atkins* case, holding that militarized guards are not "employees" within the meaning of the Act (*Atkins*, R. 321, 364), conflicts with the holding of the Circuit Court of Appeals for the Sixth Circuit in the *Jones & Laughlin* case that such persons are "employees * * * entitled to the protection of the Act" (*Jones*, R. 84–85, 121).

The Board's findings in both cases with respect to the employment status of the militarized guards are in conformity with the regulations of the War Department (*supra*, pp. 8–13). The provisions of these regulations have been integrated into the Board's settled policy established in a large number of cases in which the Board has examined the employment status and determined the bargaining rights under the Act of plant guards who are members of the civilian auxiliary to the military police. Since the applicable War Department orders and regulations establish a common status for such guards wherever they are found (*supra*, p. 8), the Board has recognized the "militarized plant guard" as an employee-category which does not vary materially from case to case.[13] The Board's decisions in

[13] A collection of more than 135 of the Board's decisions upholding the collective bargaining rights of plant guards as "employees" within the meaning of the Act, despite their

earlier cases in this field, as well as its decisions and the supporting evidence in the instant cases (*supra*, pp. 5–15), demonstrate, moreover, that the actual relationship which exists between the employer and his militarized guards is essentially the same in every case.

In holding unsupported by substantial evidence the Board's findings that the guards were respondent's employees, the court in the *Atkins* case not only overturned a Board decision which was amply supported, but the War Department's own opinion.[14] The War Department regulations make it clear that, while militarization of plant guards superimposes upon their normal peacetime duties and responsibilities certain additional obligations, their basic status as employees of a

militarization, appears in Appendix C to the Board's prior petition for writs of certiorari in these cases, Nos. 1237 and 1238, October Term, 1944, pp. 38–41. See particularly *Matter of Chrysler Corporation*, 44 N. L. R. B. 881; *Matter of Budd Wheel Co.*, 52 N. L. R. B. 666; and *Matter of Dravo Corporation*, 52 N. L. R. B. 322. See also National Labor Relations Board: *Seventh Annual Report* (1943), p. 63; *Eighth Annual Report* (1944), p. 57.

[14] Furthermore militarized guards have been treated as private employees for purposes of the Fair Labor Standards Act (*Walling* v. *Lum*, 7 Wage-Hour Reporter 570 (S. D. Miss.)) and by the National War Labor Board (*In re Detroit Steel Products Co.*, 6 War Labor Rep. 495; *In re Brewster Aeronautical Corp.*, 11 War Labor Rep. 286; *In re Great American Industries*, 11 War Labor Rep. 287; *In re Youngstown Sheet & Tube Co.*, 15 War Labor Rep. 500). We are informed that under the Social Security Act as well, militarized guards are treated as employees.

private employer is not altered thereby. Plainly, when the War Department, which created the civilian auxiliary to the military police, provided expressly that the guard's compensation was to be determined between the guards and the management, that the guards were to remain subject to the usual social security, workmen's compensation and employer's liability provisions applicable to employees, and that they were to be "permitted to bargain collectively" (see *supra*, pp. 9–13), it manifested its understanding that they continued to be employees for purposes of labor relations and other labor legislation. This statement of the employees' rights by the agency which established their semi-military status in itself demonstrates that the Board's decision that the guards were employees for purposes of the National Labor Relations Act is not unreasonable. In making its own independent appraisal of the facts and coming to a contrary conclusion, the decision of the court below in the *Atkins* case would appear to be inconsistent with the rule governing the scope of judicial review in such matters, as prescribed by this Court in *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111.[9]

[9] Particularly striking in this respect is the action of the court in substituting for the Board's findings that "the guards are interviewed for employment by the respondent and not by the United States of America, and are hired by

The evidence shows that the guards' duties, functions, obligations, and relationship with the management were not different in the *Atkins* case from those existing in the "typical" plant guard cases (*supra*, pp. 7–12). The Seventh Circuit Court of Appeals apparently was of the view that the fact that the chief guard, a company employee who exercised control over the other guards in the performance of their day-to-day duties (*supra*, p. 12), regularly received orders from the military authorities rather than from company management (*Atkins*, R. 75, 78–82) offset the other considerations weighed by the Board. But as this Court held in the *Hearst* case, *supra*, 322 U. S. at 128, "control of 'physical conduct in the performance of the service' * * * the traditional test of the employee relationship' at common law," is not the predominant test under the Act.[16] "Employee" is

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the respondent; * * * their discharge is ordinarily initiated by respondent" (*Atkins*, R. 31; 53–54, 59, 68–72, 81–84, 91–92), and its inference that the authority exercised over these subjects by the military authorities was in the nature of a veto power (*Atkins*, R. 31), the court's own inference that "the authority to hire and discharge was solely the prerogative of the military" (*Atkins*, R. 357).

[16] In any event, under the War Department regulations (*supra*, pp. 9–13) the degree of control retained by the employer over the militarized guards who protect his plant satisfies the "control" test insofar as it is applicable here. The *Hearst* case, *supra*; *National Labor Relations Board* v. *Carroll*, 120 F. 2d 457, 458 (C. C. A. 1). See also *New Orleans-Belize S. S. Co.* v. *United States*, 230 U. S. 292; *Standard Oil*

to be construed "with reference to the purpose of the Act and the facts involved in the economic relationship" (*Hearst* case, *supra*, at 129).

The court below misconceived the facts involved in the economic relationship between the plant guards and respondent. It erroneously assumed that respondent produced goods solely for the Government and that, although respondent determined the rate of pay and paid the wages of the guards, it was reimbursed for this expense by the Government (*Atkins*, R. 350, 355; 36; 47, 277, 333). Reasoning from this erroneous premise the court concluded that respondent served as a mere conduit for payment of the guards by the Government (*Atkins*, R. 355). Even if it were true that respondent was reimbursed by the Government for the wages of the guards, this fact would not demonstrate any economic impropriety in collective bargaining between respondent and the guards. Since wages, the most important term of employment, were fixed entirely by private contract between respondent and the guards, respondent was in the same position as any private employer who, in

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Co. v. *Anderson*, 212 U. S. 215; *Carroll* v. *Social Security Board*, 128 F. 2d 876, 879 (C. C. A. 7); and *Restatement of the Law of Agency*, Ch. 7, Sec. 227 (b). That these regulations were applied to respondent's plant in full force is evident from the fact that the hours of work required of members of the guard force were determined by respondent, not by military authorities (*Atkins*, R. 78–79).

effect, determines wages unilaterally, and the guards were in the same position as the employees of any such employer, obviously standing in the same need of collective bargaining. The record shows, however (*Atkins*, R. 333), that the compensation of the guards was borne, not by the Government, but by respondent. Under these circumstances the premises upon which the Act rests (Section 1) are completely applicable to the relation between respondent and the guards; collective bargaining is essential to enable the guards to deal concerning their wages on a basis of equality with respondent.

2. In the *Jones & Laughlin* case the Sixth Circuit Court of Appeals, both in its initial decision, and in its opinion after the remand, failed to give effect to limitations imposed upon reviewing courts by Section 10 (e) of the Act. Holding inapplicable this Court's statement that the Act "expressly deprives the reviewing court of power to consider" facts not introduced before the Board (*National Labor Relations Board* v. *Newport News Shipbuilding and Dry Dock Co.*, 308 U. S. 241, 249-250), the court below considered the facts relating to the status of the guards as private police officers as though these facts, which had never been presented to the Board, and which appeared only in the stipulation entered into by counsel following the remand, "had been presented at the hearing before the Board" (*Jones*, R. 120). This de-

parture from well-settled principle obviously cannot be justified under the terms of the remand which directed the court to consider only the "alleged changed circumstances with respect to demilitarization." The guards, as the stipulation shows (*Jones*, R. 114–115), occupied the same private police status throughout the period of militarization as they did after demilitarization; that status, therefore, could not be considered as "changed circumstance" attributable to demilitarization. Moreover, the remand, fairly read, appears to authorize inquiry into the "alleged changed circumstances" only for the purpose of determining whether the Board's order was rendered moot, or, in the alternative, whether an alleged obstacle to enforcement of the Board's order had been removed. We submit that it cannot be read as authorizing decision on the merits of the Board's order on the basis of facts never brought to the attention of the Board.

In more than forty cases the Board has dealt with the question of the collective bargaining rights of plant guards who are deputized by local police authorities.[17] It was clearly improper for

[17] A survey by the Board which has not yet been completed shows that at the present time unions certified by the Board have contracts covering deputized plant guards at 22 different plants. In two other cases, the issue of the bargaining rights of deputized plant guards is pending in the circuit court of appeals. *Wilson & Co.* v. *National Labor Relations Board*, now pending in the Eighth Circuit, and *Armour & Co.* v. *National Labor Relations Board*, now pending in the Tenth Circuit.

the court below to decide this important question in a case where the issues concerning deputization were never presented to nor considered by the Board.

In both its initial decision and its decision on remand, the Sixth Circuit Court of Appeals also ignored the prohibition of Section 10 (e) that "no objection that has not been urged before the Board * * * shall be considered by the court." Throughout the proceeding before the Board, respondent's sole contention was that plant guards normally, and particularly when militarized, were a part of management and therefore not employees within the meaning of the Act (*Jones*, R. 6–8, 38–40, 56, 57, 68–70). At no time did respondent urge that if the plant guards were held to be employees, they should nevertheless be denied the right to bargain collectively through a union which also represents the employer's production and maintenance employees; yet the court below, of its own motion, declined to enforce the Board's order on this stated ground (*Jones*, R. 87–89, 119–122).[18] This action of the court below

[18] Respondent's failure in the instant proceeding to object to the Board's order on this ground is to be contrasted with its position in a case involving the plant guards at its Pittsburgh Works, in which respondent "moved to dismiss the Petition because the Petitioner is the same labor organization that represents production and maintenance employees in all of its steel plants" (*Jones*, R. 59–60). In the instant case, respondent referred to the pendency of the proceeding involving the Pittsburgh Works for the sole purpose of ex-

appears to be inconsistent with the applicable decisions of this Court. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 326 U. S. 706; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253. The important question respecting the power of the Board, under Section 9 (b), to restrict the freedom of choice of representatives of employees in an appropriate unit should not have been decided in a case where, because the issue was not raised, the Board neither considered the question nor explicated its view of the powers conferred upon

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plaining and buttressing the allegation in its Answer to the Board's Complaint that respondent's "refusal to bargain is qualified and conditional and not final and conclusive as alleged" (*Jones*, R. 38–40). Respondent took the position that it would finally decide whether or not to bargain with the Union only after the Pittsburgh case was concluded (*Jones*, R. 47, 48–50, 55–60). At no time did respondent seek to incorporate by reference in this case the objections which it had raised in the Pittsburgh case, nor did it in any other manner urge the Board to disqualify the Union from representing the guards on the ground that the Union already represented the production and maintenance employees. Since the issue was not raised, the Board's decision in the unfair labor practice case makes no mention of the point, and the only reference to it in the representation case decision (*Jones*, R. 52–55) does not discuss the power of the Board to limit the range of choice of bargaining representatives open to employees in an appropriate unit, or the considerations of public importance which support the Board's general policy of refusing to restrict plant guards' choice of representatives to unions other than those already representing other units of employees of the particular employer. Cf. *Matter of Phelps Dodge Copper Products Corp.*, 41 N. L. R. B. 973, 976–977.

it by the Act. Nor was it proper for the court below, having held that the plant guards were employees of respondent, to impose a limitation upon their choice of representatives for which respondent, perhaps calculatingly, in view of the invitation to friction between competing unions inherent therein, did not contend.

3. In deciding these important questions adversely to the Board, the Sixth Circuit Court of Appeals not only disregarded the controlling effect of Section 10 (c) of the Act with respect to the limitation of issues; it also exceeded the proper bounds of its reviewing authority by substituting for the judgment of the Board its own judgment that the bargaining pattern established by the Board's order would be detrimental to the public interest in war time. Because, in the court's view, such a bargaining pattern "might" result in a conflict between their loyalty to other employees who are members of the same union and their loyalty to their employer or the Federal Government—a conflict which would be inimical to the public welfare—the court held that the Board was under a duty to deny to the guards the right to select as their bargaining representative a union which already represented rank and file employees (*Jones*, R. 88).

In sanctioning the bargaining pattern in this case, following its established administrative practice, the Board, far from ignoring the public in-

terest as the court below charged (*Jones*, R. 88), expressly acted in furtherance of that interest. The Board's practice accords completely with the expressed policy of the military authorities (*supra*, pp. 12–13), who are charged with ultimate responsibility for the proper functioning of the militarized guards as a wartime protective force. It represents, moreover, an entirely satisfactory accommodation of the purpose and provisions of the Act to the requirements of wartime production.

The Board has held that it is not empowered to vitiate the Congressional policy, declared in Section 1 of the Act, of "protecting the exercise by workers of *full* freedom of association, self-organization, and designation of representatives *of their own choosing*" (italics supplied), by refusing to certify any representative freely chosen by employees in an appropriate unit. *Matter of Jones & Laughlin Steel Corporation*, 66 N. L. R. B., 368; *Matter of Godchaux Sugars, Inc.*, 44 N. L. R. B. 874, 877. This view comports with the interpretation of this Court that the Act confers upon employees complete freedom in the selection of representatives. In *Hill* v. *Florida*, 325 U. S. 538, 541, this Court declared:

> Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. "Full free-

dom" to choose an agent means freedom to pass upon that agent's qualifications.

Clearly then, "the function assigned to the Board is not the choice of the labor organization to represent the bargaining unit, for that is to be the free choice of the majority of the employees in some defined group of employees which the Board finds to constitute the appropriate unit."[19] In holding that the Board is authorized to decide whether a union selected by a majority of employees is "appropriate" (*Jones*, R. 115), the Sixth Circuit reached a result inconsistent with the principle thus announced by this Court in *Hill* v. *Florida, supra.*

The Board has observed no justification for departure from this principle as applied to militarized or deputized plant guards. It has noted in that connection that there is "no necessary conflict between self-organization for collective bargaining and the faithful performance of duty" (the *Chrysler* case, *supra*, 44 N. L. R. B. at 885–886). [Italics added.] As with other employees, the Board has refused to indulge the "implication that membership in a union tends to undermine the honesty of plant-protection employees or their competence to execute their duties satisfactorily" (the *Dravo* case, *supra*, 52 N. L. R. B.

[19] Opinion of the late Mr. Chief Justice Stone, dissenting on other grounds, in *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146, 171–172.

at 327). Unsupported assertions concerning what the public interest requires have been ineffective, in this, as in other classes of cases, to induce the Board to withdraw the protection of the Act from a large segment of the Nation's working population. The *Chrysler*, *Dravo*, and *Budd Wheel* cases, *supra*.

At the same time, the Board has given the fullest consideration to the exigencies of the war emergency and to the effect of the guards' militarization upon their relationship to their employer and to the Government. It has noted that the "militarization of plant-protection employees, while no obstacle to unionization, is nevertheless significant" (the *Dravo* case, *supra*, 52 N. L. R. B. at 328). To accommodate the bargaining process to the situation presented by the militarization of plant guards the Board has, as a matter of policy, segregated such guards into bargaining units separate and distinct from bargaining units of other employees of the same employer[20] "to the end that the guards may be better able to function within the military sphere, and to permit the military authorities to exercise greater control over the guards" (the *Dravo* case, 52 N. L. R. B. at 328). The Board believes that its unit policy with respect to militarized guards satisfies the

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[20] See in particular the *Chrysler* case, 44 N. L. R. B. at 886–887; the *Dravo* case, 52 N. L. R. B. at 328; the *Budd Wheel* case, 52 N. L. R. B. at 670–672.

security requirements of wartime, and that neither the policies of the Act nor the public interest generally require any further restriction upon militarized guards in the exercise of the bargaining rights protected by the Act.[21] As the Board declared in the *Budd Wheel* case, *supra*, 52 N. L. R. B. at 670, "An efficient prosecution of the war effort demands the preservation of the right to collective bargaining, not its destruction."[22] And, as we have shown, the mili-

[21] The "remedy for inefficiency or wilful disregard or neglect of duty on the part of the plant-protection employees lies implicitly in the power of the Company to discipline or discharge them and in the power of the military authority to take all necessary steps to protect the public interest." The *Chrysler* case, 44 N. L. R. B. at 866. Cf. *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 131–132.

Furthermore union contracts on behalf of militarized guards invariably contain a provision subjecting the contract to the War Department regulations affecting militarized guards and provide that the contract shall in no way interfere with the guards' performance of their duties as auxiliary military police. Such a contract is in evidence in the *Atkins* case (*Atkins*, R. 297–304). Excerpts from such contracts appear at *Jones*, R. 101–106.

[22] Cf. *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67, 81 (C. C. A. 3), in which the court stated:

"The second consideration, namely, the serious nature of the production of everything that pertains to war industry is of obvious importance. But the argument of lawyers in a courtroom that the disestablishment of a present bargaining unit and the abrogation of a present contract will disturb that production or will not disturb it is necessarily pure speculation. The Board is charged with the responsibility of representing the public interest, not that of private liti-

tary authorities in charge of such guards, who are in a better position than the courts to pass judgment on the national interest in such matters, have approved the Board's view.[23]

Moreover, the court's decision directs the Board in future similar cases[24] to perform, in the name of the public welfare, a supervisory function over the choice of representatives of bar-

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gants. This the courts have said over and over again. Neither we nor counsel may assume that the Board is not conscious of all the factors to be taken into consideration in the present emergency nor have we any reason to assume lack of competence on their part to arrange such adjustment as is necessary to preserve the public interest. The problem is peculiarly one for expert administration and that the statute has lodged in the Board, not the courts."

[23] Experience, moreover, has demonstrated the reasonableness of the Board's policy. The Board has certified bargaining representatives for units of militarized guards in more than 105 cases. In more than 80 of these cases the certified union also represented a separate bargaining unit of other employees of the same employer. In a large number of these cases the employer recognized the certified union and entered into contractual relations with it. Despite this extensive application of the policy followed in the instant case, the Board has received no indication from any source that the dangers to the public interest and particularly to the war effort allegedly inherent in that policy have in fact materialized in any case.

[24] The Board has decided and continues to be presented with large numbers of cases involving the bargaining rights of plant guards who are deputized or commissioned as public police officers. *E. g., Matter of Bethlehem-Fairfield Shipyard, Inc.*, 61 N. L. R. B. 901, 905–906; *Matter of Standard Steel Spring Co.*, 62 N. L. R. B. 660, 662; *Matter of Frick Co.*, 63 N. L. R. B. 837, 840; *Matter of Rockbestos Products Co.*, 47 N. L. R. B. 1312, 1313–1314.

gaining units of plant guards, a function the Board believes the Act prohibits it from performing. The court below in its recent decision in *National Labor Relations Board* v. *Packard Motor Car Co.*, decided August 12, 1946, indicated that it would apply the same principle to the selection of representatives by units of supervisory employees. As long as the decision below stands, therefore, it constitutes a major obstacle to administration of the Act in accordance with the Board's views of the powers conferred upon it, and unsettles many cases involving both plant guards and foremen decided by the Board on the contrary theory. See, *e. g.*, *Matter of Jones and Laughlin Steel Corp.*, 66 N. L. R. B. 368; *Matter of Curtiss Bay Towing Co.*, 66 N. L. R. B. 1152; *Matter of Texas Co.*, 67 N. L. R. B., No. 59; *Matter of Williams Oil-O-Matic Division of Eureka-Williams Corp.*, 67 N. L. R. B., No. 140; *Matter of Virginia Electric & Power Corp.*, 68 N. L. R. B., No. 72.

4. The questions raised by these cases are important for, if the decisions below stand, they overturn a Board policy which for a period of years has effected stable conditions in a large and difficult area of labor relations. These decisions reach further than the bargaining relationship between the employers and guards involved in the instant cases. In over 135 cases, the Board has upheld the right of militarized plant guards to bargain collectively under the Act (see *supra*,

note 13, pp. 21-22). If the Seventh Circuit's opinion in the *Atkins* case stands, the Board may well be required to undertake new proceedings to establish bargaining rights once again for the now demilitarized plant guards. As we have shown (*supra*, p. 22) militarized guards such as those involved in this case, have been considered to be employees of private employers within the meaning of the Fair Labor Standards Act, the Social Security Act, and by the National War Labor Board. The decision below appears to cast doubt upon the validity of that view, and thereby unsettles an important area in which private rights have accrued.

Similarly, in more than 40 cases, the Board has upheld the right of deputized plant guards to bargain under the Act through unions which also represent the employer's rank and file employees.[25] Indeed, that bargaining pattern is present in almost 90 percent of the cases involving plant guards generally and deputized guards in particular. If the Sixth Circuit's opinion in the *Jones & Laughlin* case stands, the entire bargaining pattern which has developed in this field will be destroyed. The court's opinion invites employers in the Sixth Circuit who have entered into bargaining relations with plant guards in accordance

[25] We are informed that the National Mediation Board has also decided between 20 and 30 cases involving the same question and that its power to certify as representatives of units of deputized guards labor organizations representing other railroad employees has never been challenged.

with the Board's present position to disrupt those relations.

Cases involving units of deputized plant guards are coming before the Board in increasing numbers. It is important to the proper administration of the Act that the Board not be embarrassed in applying its established policy in this field by an opinion of a circuit court of appeals upon which employers generally may rely, and which is likely to thwart amicable settlement of cases involving the bargaining rights of deputized guards without formal Board proceedings, at least in the Sixth Circuit. It is also important for all concerned to know whether, in the exercise of the Board's judgment and administrative discretion as to ways and means of effectuating the policies of the Act in wartime, its determinations are to be accepted by the courts when not unreasonable, or whether, as the courts below appear to hold, its decisions on these matters are to be subject to *de novo* judicial review.

CONCLUSION

It is respectfully submitted that this petition for writs of certiorari should be granted.

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AUGUST 1946.

APPENDIX A

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372; 29 U. S. C., Secs. 151, *et seq.*) are as follows:

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of com-

merce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * * *

DEFINITIONS

SEC. 2. When used in this Act—

* * * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to

the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

* * * * * *

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-

organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

* * * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the

district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

APPENDIX B

War Department Regulations providing for the organization of a civilian auxiliary to the military police units:

WAR DEPARTMENT

HEADQUARTERS, ARMY SERVICE FORCES
WASHINGTON

CIRCULAR No. 15 MARCH 17, 1943.

AUXILIARY MILITARY POLICE.

Circular No. 52, Headquarters, Services of Supply, August 28, 1942, subject, "The Military Organization of Plant Guard Forces," is rescinded, and the following substituted therefor:

1. *Purpose of military organization.*—*a.* Executive Order No. 8972, December 12, 1941, authorizes the Secretary of War (and the Secretary of the Navy) "to establish and maintain military guards and patrols, and to take other appropriate measures, to protect from injury and destruction certain strategic premises, materials, and utilities." Accordingly, the Secretary of War directed the military organization of plant guard forces as Auxiliary Military Police (see attached letter, The Adjutant General's Office, AG 231.43 (7-2-42) MS-SPAAM-M, July 2, 1942, subject, "Military Organization of Plant Guard Forces.") The purpose is to increase the authority, efficiency, and responsibility of guard forces at plants important to the

prosecution of the war, and through military training to provide auxiliary forces throughout the United States to supplement the Army in wartime emergency situations.

b. Nothing in this circular will be construed as modifying the responsibility of plant managements "for providing adequate protection at all times against all hazards," (par. 4, Memorandum No. S380–4–43, Office of The Adjutant General, Feb. 18, 1943, subject, "Responsibilities for Internal Security.") The plant guard officer (see par. 4*d*) may, however, take appropriate action through the plant management to correct any condition deemed by him to result in or threaten defective or inadequate performance by the guard forces of its ordinary protective duties.

c. The term "plants" as used in this circular, includes civilian plants and installations important to the prosecution of the war; War Department plants, posts, camps, and stations; civilian or municipal plants and facilities essential to power, communication, and transportation; other facilities and installations deemed important to the prosecution of the war.

d. The phrase "plants assigned for protective survey and inspection" used in paragraph 1, attached letter, refers to plants and facilities on the Master or Service Command Responsibility List. Before the guard forces at any civilian or municipal plant are militarized, the plant must appear on the Master or Service Command Responsibility List.

2. *Mission of the Auxiliary Military Police.*—*a.* The mission of a guard force of Auxiliary Military Police is—

(1) To provide internal and external protection of the plant against sabotage, espionage, and natural hazards.

(2) To serve with the Army in providing protection to the plant and its environs in emergency situations.

b. An emergency situation in which the Auxiliary Military Police may be called upon for military service may arise from flood, conflagration, or other disaster; internal disorders hazardous to property or production important to the prosecution of the war; enemy action by air raid; fifth column activity; paratroop attack or invasion; or it may arise from any other condition or circumstance involving the plant or its community making it necessary to place in operation one or more of the emergency plans of the War Department or of the service command.

c. A guard force or any member thereof, whether on or off duty, may be assigned to duty in an emergency at places other than the premises of the plant normally served, provided only that in the opinion of the plant guard officer or other representative of the Army in command such assignment will contribute to the protection of the guard force's own plant and its environs or to the protection of its production.

3. *Persons eligible for membership in Auxiliary Military Police.—a.* The plant guard officer will determine in each case which groups of employees, in addition to the regular plant guard force, may become members of the Auxiliary Military Police. Persons such as firemen, watchmen, and women guards may be included provided they are able physically to perform the mission and duties of the Auxiliary Military

Police described herein and in the agreement signed by the Guards. Women guards may be armed; but in view of the congressional policy that women's auxiliary forces be limited to noncombatant duty, it is directed that in formulating plans for any emergency situation requiring the use of force against the enemy, such plans will provide for the assignment of any women members of the Auxiliary Military Police to noncombatant activities.

b. No minimum number of guards is required for the militarization of any guard force. Guard forces, no matter how small, will be militarized if the plants which they guard are so located that the guards can be organized, trained, and commanded efficiently by available Army personnel, and if, in the opinion of the plant guard officer, the results obtainable are commensurate with the effort involved.

c. Employment of an alien as a plant guard must be approved by the Secretary of War in the same manner as employment of an alien having access to work on classified or aeronautical contracts.

4. *Responsibility for military organization, training, and command of the Auxiliary Military Police.—a. The Provost Marshal General.*—The Provost Marshal General is charged with the general supervision of activities relating to the Auxiliary Military Police as a part of the internal security program. Requests for legal opinions relating to the Auxiliary Military Police will be made through military channels to the Provost Marshal General.

b. Commanding generals of service commands.

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(1) The commanding generals of service commands are responsible for the military organization, training, and command of the guard forces at all plants and installations within their respective service commands except plants and installations which are under the continuing protection responsibility of the Navy, ports of embarkation, and plants and installations which in the opinion of the Provost Marshal General should be exempt from such organization.

(2) At ports of embarkation, the local commanding officer is responsible for the military organization, training, and command of the guard forces. The commanding general of the service command will be advised, if he so requests, of the number, location, equipment, and state of training of such guard forces, and he may make recommendations in connection therewith. The commanding general of the service command may inspect these guard forces at times convenient to the local commanding officer.

c. Commanding officer having jurisdiction over the guard forces. (See par. 3, attached letter.)

(1) *Plants and installations having no local resident commanding officer.*—The commanding general of the service command will designate an officer to be the commanding officer having jurisdiction over the guard forces of plants and installations at which there is no local resident commanding officer. This officer will be the commanding officer of the district of the service command in which the plant or installation is located, unless the commanding general of the service command directs otherwise.

(2) *Plants and installations with a local resident commanding officer.*—The com-

manding officer having jurisdiction over the guard forces of plants and installations (including ports of embarkation) at which there is a resident local commanding officer will be such commanding officer.

(3) In all matters pertaining to military organization, training, and command of the Auxiliary Military Police, the commanding officer having jurisdiction over the guard forces (except such officer at ports of embarkation) will report to the commanding general of the service command.

d. Plant guard officers.

(1) For each plant or group of plants at which there is no local resident commanding officer, the commanding generals of service commands will appoint or cause to be appointed a commissioned officer called the "plant guard officer" to have command (see par. 6*a* (1)) of the guard force.

(2) At each plant where there is a local resident commanding officer, this officer will either serve as plant guard officer himself; appoint an officer from his command so to serve; or request the commanding general of the service command to appoint or cause to be appointed a plant guard officer.

(3) The plant guard officer is the member of the Army of the United States in command (see par. 3*c*, attached letter) of the guard force, and will report direct to the commanding officer having jurisdiction over the guard force (see *c*, above) on all matters pertaining to the military organization, training, and command of the Auxiliary Military Police. Noncommissioned officers from the Army of the United States will be assigned when available to the plant guard officers for the purpose of assisting in military drill and instruction.

c. Termination or change of continuing protection responsibility.

(1) If a plant at which the guard force has been organized as Auxiliary Military Police is removed from the Master or Service Command Responsibility List, the commanding general of the service command will determine whether such guard force will be continued as Auxiliary Military Police, and trained and commanded as before, or whether its status as such will be terminated. In the latter event, each member in good standing of such force will be issued a Certificate of Meritorious Conduct (see par. 6*c*).

(2) Should the responsibility for the continuing protection of any plant at which the guard force has been organized as Auxiliary Military Police be transferred from the Army to the Navy, each member in good standing of the force will be issued a Certificate of Meritorious Conduct prior to the actual assumption by the Navy of the responsibility for continuing protection.

5. *Activation of organization of Auxiliary Military Police.—a. Articles of War explained.*

(1) Guard forces which have not been organized as required (see par. 1, attached letter) will be assembled at the earliest practicable date by the plant management at the request of the plant guard officer. At this assembly the Articles of War as prescribed by Article of War 110 will be read and explained to each member of the guard force (par. 3*a*, attached letter) by the plant guard officer or in his absence or unavailability by some other competent person who is an officer of the Army or

civilian officer of the Auxiliary Military Police. As certain of the Articles of War are generally inapplicable to Auxiliary Military Police, the foregoing directive will be considered complied with if Articles 2, 58, 59, 61–64, 66, 68–74, 76, 81–83, 85, 88–90, 92–94, 96, 104, and 105 are read and explained. These Articles define certain offenses punishable by court martial of which persons subject to military law may be guilty.

(2) The Auxiliary Military Police, immediately after the Articles of War have been read and explained, will be impressed with the fact that the Government of the United States is directly interested in the security and protection of the plant and its production as essential to the successful prosecution of the war. To this end the plant guard officer will issue and post a guard order reading, with appropriate variation to meet local conditions, substantially as follows:

Guard Order No. ____

To the Auxiliary Military Police at_____

1. On (date) the guard forces at this plant were activated by the War Department as Auxiliary Military Police, and for military purposes will be commanded, drilled, and instructed as military units.

2. All members of the guard force are subject to the Articles of War and may be court martialed or otherwise punished for violations thereof.

3. Effective on this date _____, a commissioned officer of the Army of the United States has been placed in command. Although in command at all times, this officer has not superseded the civilian guard officers and normally will exercise direct control only in matters relating to military

instruction and duties as Auxiliary Military Police.

4. The mission of this guard force is to provide protection for this plant. In addition to its normal functions the force or any member thereof whether on or off duty is available for military use in any emergency, whether it be the result of flood; conflagration, or other disaster; internal disorders hazardous to the plant property or its production; or enemy action of any nature. *No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission.*

5. The Government of the United States regards the protection of this plant and its production as essential in the successful prosecution of the war. The Auxiliary Military Police are ordered to provide this necessary protection and to ward off danger or threat of danger of any kind and from any source. If force must be used to accomplish this result, it will be used only to the extent reasonably necessary.

6. No member of the Auxiliary Military Police may resign without the written approval of the plant guard officer. In attention to duty, failure to attend required drill, and conduct unbecoming to the service may be cause of dismissal and the denial of a Certificate of Meritorious Conduct.

For the Commanding Officer, _____ District:

_____
(Date)

_____
(Plant guard officer)

The foregoing guard order will be issued in accordance with the provisions of *c* below.

b. Pledge and agreement.

(1) At the time of reading the Articles of War, each member of the guard force will

give the pledge of loyalty to the United States and execute the agreements prescribed form of which is shown in the inclosure to the attached letter. A separate pledge or oath is not required. If a guard refuses to sign the agreement, he may (but need not) be temporarily retained with the understanding that he will be dismissed as soon as replaced, and in any event within a reasonable time. The signed agreement will be retained by the plant guard officer. The guard force will be considered as a civilian auxiliary to the Military Police when 75 percent of the guards at a given plant have signed the agreement. (See par. 3, attached letter.) A certificate of membership in the Auxiliary Military Police will be issued each member. Forms will be supplied to the commanding generals of service commands by the Provost Marshal General.

(2) Each plant guard who becomes a member of the Auxiliary Military Police continues as such until he is released from his obligations. This will take place when competent military authority has approved of his dismissal or resignation (see par. 6*b*) or when he has been discharged without honor (see par. 6*c*).

c. Auxiliary Military Police orders and regulations.

(1) Orders and regulations for the Auxiliary Military Police from the military authority will be issued in the name of the commanding officer having jurisdiction over the guard forces. (See par. 4*c*.)

(2) At civilian-operated plants, such orders will be issued only after consultation with and, if possible, concurrence by the plant management.

6. *Status of Auxiliary Military Police.—a. Control.*

(1) The Auxiliary Military Police will continue to function as formerly, except that a member of the Army of the United States will be in command at all times, and except that they will be trained and instructed with a view to supplementing the Army in affording protection in emergency situations (see par. 2*b*). Control, therefore, will be exercised as heretofore through the plant management except at drill and except in emergency situations. Although the plant guard officers will be in command at all times, *they will not supplant the civilian guard officers,* and unless expediency demands otherwise will exercise their authority through the chain of command established by the plant management.

(2) The Auxiliary Military Police are supplementing the Army of the United States in a vital task of protecting war material and war production facilities. Attempts to intimidate them or to reduce or nullify their efficiency, or interfere with the performance of their mission, may constitute a violation of Federal as well as state criminal laws. When such incidents are suspected, an inquiry will be made and a detailed report will be sent immediately through channels to the office of the Provost Marshal General as a basis for requesting an investigation or prosecution.

b. Employer-employee relationship.

(1). Basically, the militarization of plant guard forces does not change the existing systems of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant man-

agements. Guards in the employ of a private employer may, as heretofore, be dismissed by that employer, and those who are Civil Service employees in the employ of the War Department may be dismissed by the local commanding officer in accordance with Civil Service regulations. In neither case is a court martial necessary.

(2) A member of the Auxiliary Military Police may not be employed or dismissed and may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant's guard force would be impaired and declines to give his approval thereto.

c. Certificate of Meritorious Conduct.—A Certificate of Meritorious Conduct will be issued to each member of the Auxiliary Military Police whose service is terminated honorably. Forms will be supplied to the commanding generals of service commands by the Provost Marshal General. In the event of termination of service under conditions other than honorable, no such certificate will be issued. The commanding general of the service command may authorize a communication to each member of the Auxiliary Military Police whose service is terminated under conditions other than honorable, which will state only the fact of termination, the date, and that the communication is not a Certificate of Meritorious Conduct.

d. Discharge without honor.—If a member of the Auxiliary Military Police permanently quits his employment without approval of the plant guard officer or other duly authorized officer, a notice substantially as follows may be transmitted to him and a copy posted on the plant bulletin board:

SUBJECT: Discharge without honor.
To:

This is to notify you that you are discharged without honor as a member of the Auxiliary Military Police. A copy of this discharge and full statement of facts concerning your absence from duty without leave are being furnished the Provost Marshal General and the Selective Service System, Washington, D. C., for such further action as may be deemed appropriate.

By command of (Commanding General, _____ service command)

Discharge without honor will be regarded as exceptional procedure applicable to exceptional cases when the guard in fact is no longer in the employ of the company and is not available for dismissal, suspension, or reprimand. It should be used only after careful investigation of the facts, which may include a hearing if deemed advisable.

c. Appeal from dismissal.—A member of the Auxiliary Military Police employed by a civilian employer, discharged without honor or dismissed by or at the request of the plant guard officer or other authorized War Department representative (except by court martial proceedings), may, within 30 days of such discharge or dismissal, appeal through channels to the next superior Army authority in writing to reconsider such action. Such appeal will include a brief signed statement of the reasons for regarding the action unjust. If a member of the Auxiliary Military Police is discharged without honor or dismissed for an offense constituting a violation of the Articles of War, he may ask for a trial by court martial.

f. Employee benefits.—The status of the employer in respect to the employee benefits for the guard force is not changed. For example, social security, workmen's compensation, and employer's liability provisions remain unaffected. Employers should have a clear understanding with their insurance companies concerned.

g. Contractual relations.—It is not anticipated that the organization of plant guards as Auxiliary Military Police necessitates changes in existing contracts with the Government, but in any exceptional case where such alterations are essential to carry out the organization, arrangements to effect the necessary changes will be initiated by the plant guard officer with the least delay possible.

h. Labor relationships.

(1) If any proposed labor agreement is being considered which involves plant protection employees who are or may become members of the Auxiliary Military Police, the contracting parties will be urged to insert in such agreement a provision substantially as follows:

"It is understood that for the duration of the war this agreement is in all respects subject to the provisions of the directives of the War Department concerning military organization of the plant guard forces (letter, The Adjutant General's Office, AG 231.43 (7-2-42) MS-SPAAM-M, July 2, 1942, subject, "Military Organization of Plant Guard Forces"; and Circular No. 15, Headquarters, Army Service Forces, March 17, 1943, subject, "Auxiliary Military Police," and any amendments thereto), and that nothing contained in this agreement will be construed in any way to

interfere with the organization, efficiency, training, and control by the War Department of the company guard force as an Auxiliary to the Military Police, nor to abrogate or interfere with the duties, responsibilities, and rights imposed by the War Department upon any employee in such Auxiliary Military Police."

(2) Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police. In view of recent decisions by the National Labor Relations Board (see In re Lord Mfg. Co. & United Rubber Workers of America, CIO, Case No. R–4826, February 1943), the Auxiliary Military Police should be represented in collective bargaining with the management by a bargaining unit other than that composed of the production and maintenance workers, although both bargaining units may be affiliated with the same labor organization. Where the guards are not now included in the same bargaining unit, this is mandatory; where the guards are included in such unit, serious consideration will be given to effect a change to conform to the foregoing policies.

7. *Qualifications and equipment of Auxiliary Military Police.—a. Physical fitness.*—A member of the Auxiliary Military Police must be physically fit to perform his duties properly and in an efficient manner. It is sufficient if his physical fitness satisfies the plant guard officer.

b. Uniform.—Each member will be properly uniformed by the plant. A complete uniform consisting of blouse or shirt,

trousers, and hat is not required although the complete uniform is preferred. The plant guard officer will determine, with due regard to all circumstances, whether his guard force is "properly uniformed."

c. Distinctive insignia.

(1) Because the mission of the Auxiliary Military Police includes service with the Army (see par. 2*b*), the laws of war require that members wear distinctive insignia or marks capable of recognition at a distance. By wearing such insignia or marks members serving with the Army will be recognized as legitimate troops and not deemed irregulars or guerillas. Accordingly, members of the Auxiliary Military Police will wear either—

(*a*) An arm band (brassard), white, with the words "Auxiliary Military Police" in blue, such as has been distributed to commanding generals of service commands for issuance; or

(*b*) A badge or patch which may be worn on the right or left sleeve, at the shoulder or cuff level, or on the right or left breast pocket, either of a design substantially similar to the drawing attached to the letter, Office of the Provost Marshal General, SPMGS 231.4, November 28, 1942, subject, "Distinctive Insignia for Auxiliary Military Police," or of any other design, capable of recognition at a distance, bearing the words "Auxiliary Military Police," and approved by the commanding general of the service command.

Commanding generals of service commands will determine the device that will be worn by a given guard force and the manner and time of wearing it. Badges or patches must be procured by the plants

adopting them, at their own expense, and may be manufactured of any noncritical material. Commanding generals of service commands may also authorize plants to procure at their own expense arm bands, similar in appearance to those already issued, of any color combination capable of recognition at a distance and manufactured of any noncritical material.

(2) Each member of the Auxiliary Military Police is authorized to wear a service stripe for each six months of service faithfully performed. Service stripes will be in accordance with Army Regulations (see par. 27*c*, AR 600–35, Nov. 10, 1941, "Personnel—Prescribed Service Uniform"; par. 46*c*, AR 600–40, Aug. 28, 1941, "Personnel—Wearing of the Service Uniform"), except that they will conform in material and color to the chevrons furnished by the plant management to noncommissioned officers of the guard force.

(3) Commanding generals of service commands may authorize a guidon for an Auxiliary Military Police force which has shown itself outstanding in training, appearance, and efficiency.

d. Identification cards.—Each member of the Auxiliary Military Police must carry at all times an identification card bearing his photograph, fingerprints, signature, and description properly authenticated by the plant guard officer. As no special form of card is required, existing cards which can be made to satisfy all of these requirements may be utilized. The description of the guard need not be in detail, and will be sufficient if it contains easily recognizable characteristics such as color of hair and eyes, height, weight, and age.

e. Arms.

(1) The Auxiliary Military Police must be armed with appropriate weapons furnished by the plant management if such arming is recommended by the plant guard officer. Any sidearm, rifle, or shotgun may be an appropriate weapon depending on the circumstances. Training in the use of firearms and providing ammunition therefor are functions of the plant management. If the plant guard officer determines that the Auxiliary Military Police are not sufficiently trained in the use of firearms or are not adequately qualified in marksmanship, he may require the plant management to give further training and when he deems it desirable may accomplish such training himself.

(2) The Auxiliary Military Police, as agents of the Federal Government, will not be subject to any state or municipal requirement which conflicts with their wartime duties. A member of the Auxiliary Military Police required to be armed in performance of his duties will not be compelled to obtain a license, permit, or bond to possess small firearms in order to comply with local statutes or ordinances. State authorities have concurred when this question has been presented. The full cooperation of state and local authorities will be obtained and local requirements met unless a satisfactory understanding is reached.

f. Deputizing.—In general, there will be no considerable additional advantage in deputizing members of the Auxiliary Military Police as sheriffs or marshals. However, there will be individual cases in which it will be advisable to continue the local or state official capacity. The authority of the plant guard includes power to arrest with-

out a warrant for violation of the Sabotage Act (50, U. S. C., 101–106) or the Espionage Act (50, U. S. C., 21 and 32).

g. Training.

(1) The plant management continues to be charged with the training of its guard forces in their ordinary protective duties. In addition, the guard force must be qualified to perform its mission as set forth in paragraph 2*a*. This includes the ability to serve efficiently with the Army in any emergency situation that may arise (see par. 2*b*. To this end, the Auxiliary Military Police will be trained by or under the direction of the plant guard officer in military subjects to the extent he deems necessary. The use of experienced personnel from within the guard force for the purpose of conducting such training will be encouraged by the plant guard officer. The time to be devoted to such training will be determined by the plant guard officer. It will not exceed one hour per week or its equivalent except with the approval of the plant management.

(2) The military training will consist of such of the subjects listed in (3) and (4) below as the plant guard officer finds appropriate for each guard force, giving due consideration in each instance to the character, experience, previous training, and qualifications of the force as well as the locality and geography of the plant, its importance in the prosecution of the War, and all other pertinent considerations.

(3) Basic military subjects in which training may be given include—

(*a*) Military courtesy and discipline; Articles of War.

(*b*) Defense against air and parachute attack.

(*c*) Interior and special guard duty (military only).

(*d*) Personal encounters.

(*e*) Inspections.

(*f*) Use of weapons—hand grenades, pistol, police riot club, shotgun, tommy gun (where applicable).

(*g*) Military police—organization, duties, powers of arrest, use of force, etc.

(4) Advanced subjects in which training may be given include—

(*a*) Riot formations.

(*b*) Approach marches.

(*c*) Other applicable subjects included in military police tactical unit training.

(*d*) Tactical problems which may be given from time to time to determine the effectiveness of the guard force in emergency situations.

(5) Judgment, initiative, imagination, and a cooperative relationship with the plant management are essential in determining the kind and amount of training to be given. Not only will the training requirements vary in different plants, but the requirements within a given guard force may vary. Guards will not be required to attend drill or instruction covering subjects in which they are already trained and qualified. Training films, film strips, and film bulletins are regarded as valuable in the military training of Auxiliary Military Police, and the plant guard officer will encourage their use. The necessary projecting equipment, in which there may be a shortage, may often be borrowed from local clubs and similar organizations. The objective of all training is to increase the efficiency of the Auxiliary Military Police, and unless this is accomplished the plant guard officer has failed in his mission.

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8. *Subjection of auxiliary Military Police to military law.—a. Court martial jurisdiction.*

(1) The commanding generals of service commands have general court martial jurisdiction over the plant guard forces within the geographical limits of their commands. The commanding officer of any War Department owned and operated plant and the commanding officer having jurisdiction over the guard forces (see par. 4*c*) have the power to appoint special and summary courts martial, subject to the right of superior authority to appoint such courts when deemed desirable. The commanding officer having jurisdiction over the plant guard forces may also appoint summary courts martial subject to the same right of superior authority to appoint such courts; except that when the plant guard officer is the only commissioned officer present with a plant guard command, he will be the summary court martial of that command and will hear and determine cases brought before him.

(2) The plant guard officer also has the summary disciplinary authority of a company commander pursuant to Article of War 104. Attention is directed to the fact that an offender may not be summarily punished if he demands trial by court martial and also that if, after consenting to receive summary punishment, he deems his punishment too severe he may appeal to the next superior authority for review. Court martial jurisdiction exists at all times, even while the Auxiliary Military Police are off duty. However, it is inadvisable to order a court martial for offenses committed while off duty and not within the plant premises, unless the offense is directly con-

nected with the individual's duties as a member of the Auxiliary Military Police.

(3). Pending instructions to the contrary, no court-martial proceeding of any nature involving a member of the Auxiliary Military Police will be commenced without the prior approval of the War Department.

b. Discipline.—The institution of a court-martial proceeding will be resorted to only in cases where no other form of punishment will be effective. If the offense involves a violation of a criminal statute or ordinance other than the Articles of War, the individual will be turned over to the civil law enforcement officials.

c. Confinement.—In the absence of an adequate guardhouse or place of confinement, offenders will be confined at the nearest military post having a guardhouse, or turned over to the United States marshal for custody. United States marshals usually have arrangements with the state or local civil authorities for the confinement of prisoners.

d. Punishment.—Unlike the court-martial punishment of a person in military service; a court martial cannot punish a member of the Auxiliary Military Police by reduction in military grade or by forfeiture of pay and allowances. Analogous punishments might be imposed, such as reduction in grade in the guard organization or temporary suspension from duty. A fine, as distinguished from forfeiture, is regarded as an appropriate form of punishment.

e. Dealing with civil authorities.—When a member of the Auxiliary Military Police injures or kills a person while in the performance of his duties, he will be arrested and detained. If a civil police official seeks to arrest him, the plant guard officer, under

the authority of the 74th Article of War, may refuse to release the individual until such release is approved by the commanding general of the service command. A member of the Auxiliary Military Police is entitled to the same protection as a sentinel under similar circumstances. If a writ of habeas corpus is issued for a member of the Auxiliary Military Police held to answer by the military, the procedure of chapter XXVII, Manual for Courts Martial 1928, should be followed.

f. Recognition of meritorious conduct.

(1) Members of the Auxiliary Military Police are eligible for the decoration "Medal of Merit" authorized by the President for award to civilians who distinguish themselves by exceptionally meritorious conduct or by performance of outstanding services. (See Bull. 1, WD, 1943.) All cases of members of the Auxiliary Military Police who, in the opinion of the plant guard officer, deserve consideration for this award will be referred through channels to the office of the Provost Marshal General for transmission to the Medal of Merit Board. A full statement of facts and appropriate recommendations will be included.

(2) Any case of meritorious conduct which in the opinion of the plant guard officer does not warrant recommendation for the award of the Medal of Merit, but which he deems deserving of official commendation, will be the subject of a special order of commendation issued by the commanding officer having jurisdiction over the guard force (see par. 4*c*). Such special orders will be issued promptly and with liberality, and will be given appropriate publicity, particularly among the guard

force concerned. A copy of each such special order will be furnished to the employer.

g. Prior instructions rescinded.—The instructions contained in all other letters and circulars concerning the organization, training and command of plant guard forces except the attached letter are rescinded.

(SPX 231.43 (2–27–43) SPMGS–MP–FH)

By command of Lieutenant General SOMERVELL:

W. D. STYER,
Major General, General Staff Corps,
Chief of Staff.

OFFICIAL:
H. B. LEWIS,
Brigadier General,
Adjutant General.

1 Incl.

WAR DEPARTMENT

THE ADJUTANT GENERAL'S OFFICE

WASHINGTON

AG 231.43 (7–2–42) MS–SPAAM–M

JULY 2, 1942.

SUBJECT: Military Organization of Plant Guard Forces.

TO: The Commanding General;
Matériel Command, Army Air Forces;
The Provost Marshal General;
The Chiefs of Supply Services.

1. Guard forces at all War Department plants, posts and stations controlled or

operated by the Supply Services or by the Army Air Forces, and at all plants assigned for protective survey and inspection to the Chiefs of Supply Services and to the Commanding General, Matériel Command, Army Air Forces, are to be organized, drilled and instructed as military units subject to the Articles of War. (Art. 2 (d).)

2. These guard forces will be organized as a civilian auxiliary to the Military Police in all ammunition plants and plants where the possibility of sabotage is greatest, giving first priority to those plants which are most vulnerable from the standpoint of sabotage activities. The organization of these civilian guard forces will be extended as rapidly as conditions permi to civilian plants having important government contracts. Priorities will be established in collaboration with The Provost Marshal General.

3. At the time any guard force is organized as a civilian auxiliary to the Military Police, the commanding officer having jurisdiction over the guard force will:

a. Cause the Articles of War prescribed by Article 110 thereof to be read and explained to each member of the guard force;

b. Issue orders and regulations setting forth the duties and responsibilities of the guard force;

c. Organize each guard force with a member of the Army of the United States in command and cause each force to be drilled and instructed with a view to supplementing the Army in resisting attack on war material, war premises, and war utilities which the force is assigned to guard.

Inclosure to ASF Circular No. 15.
March 17, 1943.

d. Require each member of the guard force to give a pledge of loyalty to the United States, and to execute an agreement acknowledging that such Articles of War are understood by him and that he is subject to the military law as long as he remains a member of the guard force. (A draft of a form of such agreement is attached.)

By order of the Secretary of War:

/s/ J. A. ULIO,
J. A. Ulio,
Major General,
The Adjutant General.

1 Inclosure.
Draft of Agreement.

COPIES FURNISHED:
The Under Secretary of War;
The Commanding Generals, Army Air Forces; Services of Supply.
The Inspector General;
The Judge Advocate General;
The Chief of Administrative Services
Staff Divisions of the Services of Supply
Divisions of the War Department General Staff.

Agreement between the United States of America and ----------
(Plant Guard)

In order that the existing military forces of the United States may be most effectively employed in combat activity against the enemies of the United States, the United States is approving the employ-

ment of certain guards as a civilian auxiliary to the military police for the purpose of guarding and protecting war material, war premises and war utilities from injury or destruction by the enemy or otherwise, including the making of arrests, as peace officers for violations of Federal laws, as well as for violations of orders and regulations issued by military authority. The United States requires that only persons physically fit, well trained in the use of arms and in the duties incident to their position, and of unquestionable loyalty to the United States be so employed.

Now, therefore, I, _____, who have been or am about to be employed by _____ _____ as a guard at _____ for the purpose of guarding certain war material, war premises, and war utilities, in consideration of my employment or the continuation of my employment, do agree with the United States of America that:

(1) I will support and defend the Constitution of the United States against all enemies, foreign and domestic;

(2) I will bear true faith and allegiance to the Constitution of the United States;

(3) I will well and faithfully discharge my duty as a civilian auxiliary to the military police to protect war material, war premises, and war utilities against all enemies, foreign and domestic, and will obey any orders issued in connection therewith by the President, as Commander-in-Chief of the Army and Navy of the United States, and by his duly authorized officers.

(4) I acknowledge that the appropriate Articles of War have been read and explained to me, and that in the performance

of my duty to protect such war material, war premises, and war utilities, I am subject to military law during the period of my employment.

(Signature of Plant Guard)

Inclosure to letter, July 2, 1942, AG 231.43 (7-2-42) MS-SPAAM-M.

U. S. GOVERNMENT PRINTING OFFICE: 1942

FILE COPY

MAR 3 1947
CHARLES ELMORE CROPLEY
CLERK

Nos. 418, 419

In the Supreme Court of the United States

OCTOBER TERM, 1946

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JONES & LAUGHLIN STEEL CORPORATION

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E. C. ATKINS AND COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE SIXTH AND SEVENTH CIRCUITS

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	3
Statute and regulations involved	4
Statement	5
I. The *Jones & Laughlin* case	5
II. The *Atkins* case	22
Specification of errors to be urged	35
Summary of argument	38
Argument	44
Introduction	44
I. The Board could properly determine that the plant guards are employees of the respective companies within the meaning of the Act	45
A. Absent militarization and deputization, the Board could properly find that plant guards are "employees" within the meaning of Section 2 (3)	45
1. The premises of the Act, as applied to the facts of the economic relation between plant guards and employers, requires that plant guards be held to be "employees" within the meaning of the Act	55
2. Statutory protection of the right of plant guards to organize and bargain collectively does not jeopardize the employer's interest in faithful performance by the guards of all legitimate tasks assigned to them	57
B. Militarization did not alter the status of plant guards as employees of private employers or remove plant guards from the protection of the Act	64
1. Militarization did not remove plant guards from the category of "employees" covered by Section 2 (3) of the Act	64
2. Militarization did not require the Board to deny bargaining rights to plant guards or to limit their freedom of choice of representatives to organizations not representing production and maintenance employees	93

Argument—Continued Page
I.—Continued
C. Deputization does not alter the status of plant guards as private employees or deprive plant guards of the right to bargain collectively through labor organizations which also represent the employer's production and maintenance employees 109
II. Demilitarization does not render moot either the Board's orders in these cases or the questions whether militarized plant guards are employees within the meaning of Section 2 (3) or whether they are entitled to bargain collectively through labor organizations representing separate units of production and maintenance workers 120
III. In the *Jones & Laughlin* case, neither the effect of deputization upon the collective-bargaining rights of plant guards nor the right of plant guards to select as bargaining representatives labor organizations which also represent the employer's production and maintenance employees should have been considered by the court below 123
Conclusion 129
Appendix A 130
Appendix B 134
Appendix C 161
Appendix D 164

CITATIONS

Cases:
Alaska Juneau Gold Mining Co., Matter of, 9 N. L. R. B. 755 47
Aluminum Company of America, Matter of, 50 N. L. R. B. 963 54
Aluminum Ore Co., Matter of, 8 N. L. R. B. 914 47
American Brake Shoe & Foundry Co., Matter of, 41 N. L. R. B. 82 49
American Brass Co., Matter of, 41 N. L. R. B. 783 ..... 110, 119
American Cyanamid & Chemical Corp., Matter of, 31 N. L. R. B. 883 49
American Cyanamid Co., Matter of, 27 N. L. R. B. 1176 48
American Forge Co., Matter of, 44 N. L. R. B. 826 52
American Hair & Felt Co., Matter of, 6 N. L. R. B. 648 47
American-Hawaiian Steamship Co., Matter of, 10 N. L. R. B. 1355 ..... 59, 60, 110, 119
American Petroleum Co., Matter of, 12 N. L. R. B. 688 48
American Rolling Mill Co., Matter of, 43 N. L. R. B. 1020 52
American Steel & Wire Co., Matter of, 51 N. L. R. B. 440 52
American Steel Foundries, Matter of, 52 N. L. R. B. 432 52

Cases—Continued

	Page
American Tobacco Co., Matter of, 2 N. L. R. B. 198	50
Apex Electric Co., Holland Reiger Division of, Matter of, 6 N. L. R. B. 156	47
Arkwright Corp., Matter of, 36 N. L. R. B. 687	49, 59
Armour & Co., Matter of, 15 N. L. R. B. 268	48
Armour & Co., Matter of, 63 N. L. R. B. 1200	75, 76, 97
Armour & Co. v. National Labor Relations Board, now pending in the Tenth Circuit Court of Appeals	126
Automotive Maintenance Machinery Co., Matter of, 13 N. L. R. B. 338	50
Baer Bros., Matter of, 43 N. L. R. B. 1267	50
Bell Telephones Laboratories, Matter of, 55 N. L. R. B. 87	50
Bendix Products Co., Matter of, 1 N. L. R. B. 173	51
Bendix Products Co., Matter of, 3 N. L. R. B. 682	110, 119
Bethlehem-Fairfield Shipyard, Inc., Matter of, 64 N. L. R. B. 901	110, 119
Bethlehem Shipbuilding Corp., Matter of, 11 N. L. R. B. 105	50
Bethlehem Steel Company, Matter of, 46 N. L. R. B. 794	52
Bethlehem Steel Corp., Matter of, 47 N. L. R. B. 1330	52
Blue Bell-Globe Mfg. Co., Matter of, 22 N. L. R. B. 961	48
E. M. Bohannon Tobacco Co., Matter of, 37 N. L. R. B. 526	49
Borg-Warner Corp., Calumet Steel Division of, Matter of, 7 N. L. R. B. 340	51
Borg-Warner Corp., Calumet Steel Division of, Matter of, 23 N. L. R. B. 114	51
Bremner Bros., Matter of, 39 N. L. R. B. 702	50
Brewster Aeronautical Corp., In re, 15 War Labor Rep. 239	61, 91
Brewster Aeronautical Corp., In re, 11 War Labor Rep. 286	91
Brown Shoe Co., Inc. Matter of, 22 N. L. R. B. 1080	48
Bryce Brothers Co., Matter of, 34 N. L. R. B. 255	49
Buckstaff Bath House Co. v. McKinley, 308 U. S. 358	93
Budd Wheel Company, Matter of, 49 N. L. R. B. 1350	59, 61
Budd Wheel Company, Matter of, 52 N. L. R. B. 666	54, 73, 104
Burnside Steel Foundry Co., Matter of, 7 N. L. R. B. 744	51
Burton Dixie Corp., Matter of, 10 N. L. R. B. 1417	50
Burton Dixie Corp., Matter of, 37 N. L. R. B. 432	49
Carroll v. Social Security Board, 128 F. 2d 876	93
J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332	123
Cayuga Linen & Cotton Mills, Inc., Matter of, 11 N. L. R. B. 1	50
Chicago and N. W. Ry. et al. v. McKenna, 74 F. 2d 155	110, 111
Chrysler Corporation, Matter of, 44 N. L. R. B. 881	73, 74, 95, 96
Clifton Mfg. Co., Matter of, 9 N. L. R. B. 13	47
Colorado Fuel & Iron Corp., The, Matter of, 29 N. L. R. B. 541	51
Colorado Portland Cement Co., Matter of, 45 N. L. R. B. 197	50
Commonwealth Edison Co., Matter of, 55 N. L. R. B. 732	50

Cases—Continued Page

Consolidated Steel Corp., Matter of, 51 N. L. R. B. 333 52
Consumers Power Co., Matter of, 9 N. L. R. B. 742 47
Continental Mills, Matter of, 30 N. L. R. B. 82 48
Coos Bay Lumber Co., Matter of, 14 N. L. R. B. 1206 48
Crossett Lumber Co., Matter of, 8 N. L. R. B. 440 50
Crucible Steel Co., Matter of, 1 N. L. R. B. 545 51
Crucible Steel Co., Matter of, 2 N. L. R. B. 298 51
Crucible Steel Co., Matter of, 66 N. L. R. B. 1157 123
Curtiss-Wright Corp., Matter of, 33 N. L. R. B. 490 59
Dempsey v. New York Central and Hudson River R. R. Co., 146 N. Y. 290 111
Detroit Steel Products Co., In re, 6 War Labor Rep. 495 91
Dravo Corporation, Matter of, 52 N. L. R. B. 322 54, 73, 74, 96, 98
du Pont de Nemours & Co., E. I., 69 N. L. R. B. 509 50
Eagle Oil & Refining Co., Matter of, 27 N. L. R. B. 1003 48
Edward Valve & Mfg. Co., The, Matter of, 38 N. L. R. B. 428 49
The Electric Auto-Lite Co., Matter of, 9 N. L. R. B. 147 47
Farmington Shoe Mfg. Co., Matter of, 41 N. L. R. B. 169 49
Farrar & Trefts, Inc., Matter of, 44 N. L. R. B. 678 50
Federal Fibre Mills, Matter of, 15 N. L. R. B. 256 50
Federal Motor Truck Company, Matter of, 50 N. L. R. B. 214 54
Federal Trade Commission v. Goodyear Co., 304 U. S. 257 123
Fentress Coal & Coke Co., 44 N. L. R. B. 1033 54
A. Fink and Sons Co., Inc., Matter of, 9 N. L. R. B. 441 47
Fleming v. Gregory, 36 F. Supp. 776 93
Flintkote Co., Matter of, 42 N. L. R. B. 929 49
Florida v. Bellman, 149 F. 2d 890 114
Ford Motor Company, Matter of, 50 N. L. R. B. 534 50
Franks Bros. Co. v. National Labor Relations Board, 321 U. S. 702 123
French Paper Co., Matter of, 22 N. L. R. B. 1054 48
Frick Company, Matter of, 63 N. L. R. B. 836 110, 119
Fruit Growers Supply Company, Matter of, 36 N. L. R. B. 959 49
General Chemical Co., Matter of, 31 N. L. R. B. 413 48
General Foods Corp., Diamond Crystal Sale Division of, Matter of, 37 N. L. R. B. 481 49
General Mills, Inc., Matter of, 3 N. L. R. B. 730 50
General Motors Corp., In re, 18 War Labor Rep. 541 91
General Motors Corp., Matter of, 39 N. L. R. B. 1108 110, 119
Gettysburg Furniture Co., Matter of, 25 N. L. R. B. 1109 48
Gibbs Gas Engine Co., Matter of, 42 N. L. R. B. 272 49
Glen Alden Coal Co. v. National Labor Relations Board, 141 F. 2d 47 93
Gluck Bros., Inc., Matter of, 45 N. L. R. B. 1159 50
Goodrich Electric Co., Inc., Matter of, 30 N. L. R. B. 979 48

Cases—Continued

	Page
Great American Industries, Inc, 11 War Labor Rep. 287	91
Greer Steel Co., The, Matter of, 4 N. L. R. B. 333	51
Gutmann & Co., Inc., Matter of, 30 N. L. R. B. 1	48
Hamrick Mills, Matter of, 44 N. L. R. B. 238	50
Hawthorne Paper Co., Matter of, 12 N. L. R. B. 43	48
Hill v. *Florida*, 325 U. S. 538	109
Holmes v. *Industrial Cotton Mills Co. Inc.*, 8 Wage Hour Rep. 1174	112
Houde Engineering Corp., Matter of, 36 N. L. R. B. 587	49, 59
Hust v. *Moore-McCormack Lines*, No. 625, October Term, 1945	93
Ideal Seating Co., Matter of, 36 N. L. R. B. 166	49
Illinois Knitting Company, Matter of, 11 N. L. R. B. 48	47
Indiana Brass Company, Matter of, 36 N. L. R. B. 966	49
Ingalls Iron Works Company, Matter of, 58 N. L. R. B. 1202	50
Inland Steel Co., Matter of, 9 N. L. R. B. 783	51
Interlake Iron Corp., Matter of, 2 N. L. R. B. 1036	51
Interlake Iron Corp., Matter of, 6 N. L. R. B. 780	51
International Harvester Co., Matter of, 5 N. L. R. B. 192	50
Jerry and Edythe Belanger, Matter of, 32 N. L. R. B. 1276	49
John Yasek, Matter of, 37 N. L. R. B. 156	49
Jones & Laughlin Steel Corp., Matter of, 1 N. L. R. B. 502, 511, 512, enforced 301 U. S. 1	52
Jones & Laughlin Steel Corp., Matter of, 52 N. L. R. B. 975	16
Jones & Laughlin Steel Corp., Vesta-Shannopin Coal Division, Matter of, 66 N. L. R. B. 386	109
Jones & Laughlin Steel Corp., Matter of, 21 War Lab. Rep. 240	16
Jones & Laughlin Steel Corporation v. *United Steel Workers of America*, 17 L. R. R. M. 854	16
Kelsey Hayes Wheel Company, Matter of, 16 N. L. R. B. 580	48
Kusnir v. *Pressed Steel Car Co.*, 201 Fed. 146	111
Lansing Co., Matter of, 20 N. L. R. B. 434	50, 62
LaPlant-Choate Mfg. Co., Inc., Matter of, 13 N. L. R. B. 1228	48
Lee Rubber & Tire Corp., Matter of, 24 N. L. R. B. 1077	48
Lehon Co., The, Matter of, 34 N. L. R. B. 313	49
Libbey-Owens-Ford Glass Co., Matter of, 10 N. L. R. B. 1470	47
Libby-Owens-Ford Glass Co., Matter of, 31 N. L. R. B. 243	48
Lincoln Mills of Alabama, Matter of, 9 N. L. R. B. 778	47
Link-Belt Speeder Co., Matter of, 37 N. L. R. B. 889	49
Little Rock Furniture Mfg. Co., Matter of, 39 N. L. R. B. 892	49
Lookout Oil & Refining Co., Matter of, 42 N. L. R. B. 560	49
Lord Manufacturing Co., Matter of, 47 N. L. R. B. 1032	96, 98
Luckenbach Steamship Company, Matter of, 2 N. L. R. B. 181	56, 58, 61, 110

Cases—Continued

	Page
Luders Marine Construction Co., Matter of, 44 N. L. R. B. 214	50
Luscombe Airplane Corp., Matter of, 69 N. L. R. B. 479	50
MacAndrews & Forbes Co., Matter of, 39 N. L. R. B. 699	49
Mack International Motor Truck Corp., Matter of, 31 N. L. R. B. 424	48
Magann v. *Long's Baggage & Transfer Co.*, 39 F. Supp. 742	93
R. C. Mahon Co., Matter of, 5 N. L. R. B. 257	51
Marshall Field & Co. v. *National Labor Relations Board*, 318 U. S. 253	128
Maryland Drydock Company, Matter of, 50 N. L. R. B. 363	54
Mary Leila Cotton Mills, Inc., Matter of, 30 N. L. R. B. 238	48
J. G. McDonald Chocolate Co., Matter of, 5 N. L. R. B. 547	47
McKesson & Robbins, Inc., Matter of, 42 N. L. R. B. 1297	49
Merrimack Mfg. Co., Matter of, 9 N. L. R. B. 173	47
Moline Iron Works, Matter of, 9 N. L. R. B. 664	51
Moulton Ladder Mfg. Co., Matter of, 27 N. L. R. B. 40	48
Moulton Ladder Mfg. Co., Matter of, 31 N. L. R. B. 665	49
National Copper and Smelting Co., Matter of, 30 N. L. R. B. 973	48
National Labor Relations Board v. *Air Associates, Inc.*, 121 F. 2d 586	102
National Labor Relations Board v. *Carroll*, 120 F. 2d 457	92
National Labor Relations Board v. *Cheney California Lumber Co.*, 326 U. S. 706	128
National Labor Relations Board v. *Condenser Corp.*, 128 F. 2d 67	102, 104
National Labor Relations Board v. *Hearst Publications, Inc.*, 322 U. S. 111	55, 77, 85, 88, 89, 93
National Labor Relations Board v. *Illinois Tool Works*, 153 F. 2d 811	102
National Labor Relations Board v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105	82
National Labor Relations Board v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241	125
National Labor Relations Board v. *Pennsylvania Greyhound Lines*, 303 U. S. 261	123
National Labor Relations Board v. *West Kentucky Coal Co.*, 152 F. 2d 198, 199-201, certiorari denied, No. 1198, October Term, 1945	93
National Supply Co., Matter of, 57 N. L. R. B. 194	59
Naumkeag Steam Cotton Co., Matter of, 13 N. L. R. B. 513	48
Newark Rivet Works, Matter of, 18 N. L. R. B. 520	48
New Indiana Chair Company, Matter of, 43 N. L. R. B. 318	50
New Orleans Belize S. S. Co. v. *United States*, 239 U. S. 202	93

Cases—Continued

	Page
North Carolina Finishing Co., Matter of, 44 N. L. R. B. 681	50
Ohio Brass Co., Matter of, 13 N. L. R. B. 72	48
Pacific Gas & Electric Co., Matter of, 40 N. L. R. B. 591	49
Pacific Mills, Matter of, 10 N. L. R. B. 26	47
Packard Motor Car Co. v. National Labor Relations Board, No. 658, This Term	57, 109, 123
Peerless Novelty Company, Matter of, 37 N. L. R. B. 622	49
Phelps Dodge Copper Products Corp., Matter of, 41 N. L. R. B. 973	108, 128
Philip Carey Mfg. Co., Matter of, 39 N. L. R. B. 769	49
Pittsburgh Plate Glass Co. v. National Labor Relations Board, 313 U. S. 146	109
Pittsburgh Steel Co., Matter of, 1 N. L. R. B. 256	51
Pressed Steel Car Company, Matter of, 47 N. L. R. B. 425	52
Pullman-Standard Car Co., Matter of, 29 N. L. R. B. 600	48
Quaker Oats Co., The, Matter of, 32 N. L. R. B. 312	49
Republic Aviation Corp. v. National Labor Relations Board, 324 U. S. 793	102
Republic Creosoting Co., Matter of, 40 N. L. R. B. 615	49
Republic Steel Corp., Matter of, 9 N. L. R. B. 219, enforced, 107 F. 2d 472, certiorari denied, 309 U. S. 684	52
Rickert Rice Mills, Inc., Matter of, 27 N. L. R. B. 466	48
Robins Dry Dock & Repair Co., Matter of, 33 N. L. R. B. 15	49
Saticoy Lemon Ass'n, Matter of, 28 N. L. R. B. 1214	48
Sculler Safety Corp., Matter of, 36 N. L. R. B. 1160	49
Shaw Lumber Co., Matter of, 28 N. L. R. B. 818	48
Singer Mfg. Co., Matter of, 8 N. L. R. B. 434	47
Solvay Process Co., Matter of, 29 N. L. R. B. 24	48
Solvay Process Co., Matter of, 30 N. L. R. B. 264	48
Southern Cement Co., Matter of, 28 N. L. R. B. 596	48
South Portland Shipbuilding Corp., Matter of, 39 N. L. R. B. 485	49
Standard Oil Co. v. Anderson, 212 U. S. 215	93
Standard Oil Co. v. Johnson, 316 U. S. 481	5
Standard Steel Spring Co., Matter of, 62 N. L. R. B. 660	110, 119
A. P. Steiner, Matter of, 42 N. L. R. B. 1384	50
Sullivan Mining Co., Matter of, 36 N. L. R. B. 107	49
Superior Coach Corp., Matter of, 39 N. L. R. B. 926	49
Sweet Candy Company, Matter of, 5 N. L. R. B. 541	47
Tampa Shipbuilding Co., Matter of, 50 N. L. R. B. 177	50
Tampa Shipbuilding Co., Matter of, 62 N. L. R. B. 954	114
Tampa Shipbuilding Co., Matter of, 67 N. L. R. B. 1359	114
Theurer Wagon Works, Inc., Matter of, 18 N. L. R. B. 837	48
Thompson v. Daugherty, 40 F. Supp. 279	93
Trojan Powder Co., Matter of, 29 N. L. R. B. 229	48
Tucker Duck & Rubber Co., Inc., Matter of, 36 N. L. R. B. 132	49
Turner Day and Woodworth Handle Co., Inc., Matter of, 33 N. L. R. B. 1220	49

Cases—Continued Page

Vanadium Corp. of America, Matter of, 13 N. L. R. B. 836. 48
Virginia Bridge Co., Matter of, 29 N. L. R. B. 241 51
Walling v. *Lum*, 7 Wage Hour Reporter 570 91
Walling v. *Merchants' Police Service, Inc.*, 59 F. Supp. 873 112
Walling v. *New Orleans Private Patrol Service, Inc.*, 57 F. Supp. 143 112
Weirton Steel Corp., Matter of, 32 N. L. R. B. 1145, enforced 135 F. 2d 494 52
West Kentucky Coal Co., Matter of, 24 N. L. R. B. 863 48
Westinghouse Airbrake Co., Matter of, 4 N. L. R. B. 403 47
Westinghouse Airbrake Co., Matter of, 42 N. L. R. B. 525 110, 119
Westinghouse Electric & Mfg. Co., Matter of, 23 N. L. R. B. 521 48
Westinghouse Electric & Mfg. Co., Matter of, 28 N. L. R. B. 799 110, 119
Westinghouse Electric & Mfg. Co., Matter of, 32 N. L. R. B. 274 49
Whiterock Quarries, Inc., Matter of, 33 N. L. R. B. 145 49
Willys Overland Motors, Inc., Matter of, 9 N. L. R. B. 924 47, 110
Wilson & Co., Inc., 63 N. L. R. B. 636 54
Wilson & Co., Matter of, 67 N. L. R. B. 662 123
Wilson & Co. v. *National Labor Relations Board*, now pending in the Eighth Circuit Court of Appeals 126
Woodside Cotton Mills Co., Matter of, 7 N. L. R. B. 960 50
Yates-American Machine Co., Matter of, 10 N. L. R. B. 786
Youngstown Sheet & Tube Co., In re, 15 War Labor Rep. 500 91
Youngstown Sheet & Tube Co., In re, 19 War Lab. Rep. 813 91
Youngstown Sheet & Tube Co., Matter of, 47 N. L. R. B. 391 52
Zenith Optical Co., Matter of, 53 N. L. R. B. 252 50, 61

Statutes:

Act of July 12, 1870, as amended, 33 Stat. 1257, 34 Stat. 48, 31 U. S. C. 665 86
Appropriations Act of 1917, 39 Stat. 1106, 5 U. S. C. 66 86
Army Reorganization Act of 1920, 41 Stat. 785, 54 Stat. 213, 10 U. S. C. 634, 1581 87
National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C. 151, *et seq.*):
Sec. 1 103, 130
Sec. 2 (2) 86, 131
Sec. 2 (3) 44, 55, 131
Sec. 7 132
Sec. 8 (1) 60, 132
Sec. 8 (3) 60
Sec. 8 (5) 132
Sec. 9 (b) 132
Sec. 10 (a) 133
Sec. 10 (e) 125, 126, 133

Cases—Continued

Page

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War Labor Disputes Act, Sec. 5, 7 (a) (2), 57 Stat. 163, 50 U. S. C. App. (Supp. V) 1501, *et seq* 103, 104
Articles of War, Sec. 2 (d), 41 Stat. 787, 10 U. S. C. 1473 87
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55 A. L. R. 1197 ..... 111, 112
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Miscellaneous—Continued

Page

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 418

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JONES & LAUGHLIN STEEL CORPORATION

No. 419

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E. C. ATKINS AND COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE SIXTH AND SEVENTH CIRCUITS

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Sixth Circuit in the *Jones & Laughlin* case (*Jones*, R. 119–122),[1] is reported at 154 F. 2d

[1] Record references relating to the two respondents herein will appear as follows: *Jones & Laughlin Steel Corporation* (*Jones*, R. —); *E. C. Atkins and Company* (*Atkins*, R. —).

932. The opinion of the Circuit Court of Appeals for the Seventh Circuit in the *Atkins* case (*Atkins*, R. 320–321), is reported at 155 F. 2d 467. The original opinions of the circuit courts of appeals in the *Jones & Laughlin* (R. 83–89) and *Atkins* (R. 348–366) cases are reported, respectively, in 146 F. 2d 718, and 147 F. 2d 730. The order of this Court, granting writs of certiorari, vacating prior judgments entered by the courts below, and remanding the cases for further consideration, is reported in 325 U. S. 838. The findings of fact, conclusions of law, and orders of the Board in these two cases (*Jones*, R. 61–68, 73–74; *Atkins*, R. 30–42) are reported in 53 N. L. R. B. 1046 and 56 N. L. R. B. 1056, respectively. The decisions of the Board in prior representation proceedings which form part of the record in these cases (*Jones*, R. 52–55; *Atkins*, R. 5–8), are reported in 49 N. L. R. B. 390 and 52 N. L. R. B. 1470, respectively.

JURISDICTION

The decree of the Circuit Court of Appeals for the Sixth Circuit in the *Jones & Laughlin* case was entered on April 4, 1946 (*Jones*, R. 118). The petition for rehearing filed by the Board was denied on May 20, 1946 (*Jones*, R. 134). The decree of the Circuit Court of Appeals for the Seventh Circuit in the Atkins case was entered on May 31, 1946 (*Atkins*, R. 322). The petition for writs of certiorari was filed on

August 20, 1946, and was granted on December 23, 1946 (*Jones*, R. 135; *Atkins*, R. 367). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. The question presented by the *Atkins* case is whether persons who are employed to guard the property of a private employer, who are compensated by that private employer at rates fixed by him, and who are also civilian auxiliaries to the military police of the Army of the United States, are "employees" within the meaning of Section 2 (3) of the National Labor Relations Act.

2. The questions presented by the *Jones & Laughlin* case are whether, in the light of Section 10 (e) of the Act, the court below could properly consider:

The Circuit Court of Appeals for the Seventh Circuit substituted for the Board's findings of fact concerning the incidents of the economic relation between the plant guards and the company, findings of its own. Since we believe, as we stated in our petition for a writ of certiorari, pp. 3–4, that the court below erred in substituting its findings for those of the Board, the case thus presents, in addition, the question whether the Board's findings of fact are supported by substantial evidence and we discuss this question in the Argument below (*infra*, pp. 64–85). This question need not necessarily be decided, however, since it is our position that even on the facts as found by the court, the Board's order should be enforced.

(a) the effect of the plant guards' deputization by local police authorities upon their collective bargaining rights, no facts concerning such deputization having been presented to the Board.

(b) whether the Board erred in not restricting the freedom of choice of militarized and deputized plant guards to organizations not representing production and maintenance employees, no objection on this ground having been raised before the Board.

3. Assuming that the matters described in question 2 could properly have been considered by the court below, a further question presented by the *Jones & Laughlin* case is whether the Board, in the exercise of its administrative discretion, may properly require an employer to bargain collectively with a labor organization as the representative of the employer's plant protection employees, when those employees are members of the civilian auxiliary to the military police of the Army of the United States, or when they are deputized by local police authorities, if the labor organization which represents them also represents a bargaining unit composed of the employer's production and maintenance employees.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151 *et seq.*) are set forth in Appendix A, *infra*, pp. 130–133. The pertinent regulations of the War Department

relating to the guard force of the civilian auxiliary to the military police, established pursuant to Executive Order No. 8972, dated December 12, 1941 (6 Fed. Reg. 6420, *Atkins*, R. 344–345), are set forth in Appendix B, *infra*, pp. 134–160.[3]

STATEMENT

I

The *Jones & Laughlin* Case

On March 15, 1943, the United Steelworkers of America (CIO), hereinafter called the Steelworkers, filed with the National Labor Relations Board a petition for investigation and certification of representatives pursuant to Section 9 (c) of the Act, in which it sought to be certified as the representative for collective bargaining of a unit composed of the approximately 60 patrolmen, watchmen, firemen and dump laborers employed by the Jones & Laughlin Steel Corporation, hereinafter called the respondent Jones & Laughlin, at its Otis Works in Cleveland, Ohio (*Jones*, R. 1–2).

At the opening of the hearing which the Board held upon this petition, the respondent Jones & Laughlin moved to dismiss the petition upon the ground that a unit composed of the employees in

[3] The Circuit Court of Appeals for the Seventh Circuit correctly held in the *Atkins* case that these War Department regulations are public documents of which the Board and the courts may take judicial notice (*Atkins*, R. 353, n. 1). Cf. *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 183–484.

question was not appropriate because these employees "perform certain assigned work that is strictly representative of management" (*Jones*, R. 8). In support of this contention, the respondent Jones & Laughlin asserted that on December 11, 1942, the Steelworkers had entered into a collective bargaining agreement covering employees at many plants, including the two known as the Otis Works, in which the Steelworkers agreed that the term "employee" in that agreement be defined as excluding foremen, assistant foremen, watchmen, salaried employees and nurses (*Jones*, R. 5–6); that by this agreement the Steelworkers expressed their desire "to have these people serve management's interest without other affiliation" (*Jones*, R. 6); and that any allegation by the Steelworkers that a unit including watchmen is appropriate is "a direct contravention of the covenants of the existing labor agreement" (*Jones*, R. 6). As part of this motion, it was stated that "It is the position of the Jones & Laughlin Corporation in this case that the unionization of watchmen or guards is not appropriate at any time—certainly not at the present time in the midst of the War program," that "these guards are charged with the responsibility for the protection of the physical plant and equipment of the Corporation," that their duties "do not differ greatly from the duties performed by members of a city, county or state police force" and "In addition, it must be realized that

those guards are now and for some time past have been sworn in as Auxiliary Military Police, and, in this connection, are under the direct supervision and jurisdiction of the United States Army" (*Jones*, R. 6–7.

Included in the motion was the full text of the oath of allegiance which each guard takes upon becoming a member of the civilian auxiliary to the military police. In the oath, the guard states that he has been or is about to be employed by Jones & Laughlin Steel Corporation as a guard at its Otis Works, and, in consideration of his employment or the continuation of his employment, he agrees with the United States that he will "support and defend the Constitution of the United States against all enemies, foreign and domestic", "bear true faith and allegiance to the Constitution of the United States", "will well and faithfully discharge" his "duty as a civilian auxiliary to the military police to protect war material, war premises, and war utilities against all enemies, foreign and domestic, and will obey any orders issued in connection therewith, by the President, as Commander in Chief of the Army and Navy of the United States, and by his duly authorized officers" and acknowledges "that the appropriate Articles of War have been read and explained to me, and that in the performance" of his "duty to protect such war material, war premises, and war utilities" he is "subject to mili-

tary law during the period" of his "employment" (*Jones,* R. 7).

The trial examiner, acting in accordance with the Board's Rules and Regulations, did not rule on this motion but referred it to the Board itself in Washington and proceeded to receive evidence. It was stipulated that the respondent Jones & Laughlin employs at its Otis Works approximately 4,700 employees (*Jones,* R. 5), including 72 plant protection employees; that the plant protection employees are divided into the following categories: 58 patrolmen, 2 firemen, 2 dump laborers, 8 lieutenants, and 2 fire captains (*Jones,* R. 4). It was also stipulated that the company was engaged in production for the national war effort (*Jones,* R. 4).

A representative of the respondent's personnel department testified that the sole duty of the 58 patrolmen was to protect plant property, that they received their pay from the company and as far as he knew the company could discharge them (*Jones,* R. 8–9). He also testified that they wore uniforms, he believed that they carried arms but was not certain, and had been sworn into the auxiliary military police (*Jones,* R. 8–9). He described the duties of the two firemen as keeping the fire equipment, hose, wagons and fire extinguishers in shape for immediate use in case of fire (*Jones,* R. 9), and explained that the two dump laborers were assigned to a refuse dump where

they were engaged in recovering scrap from slag, in connection with which they theoretically watch that section of the plant and therefore have been included in the plant protection department (*Jones*, R. 9–10). The eight lieutenants and two fire-captains are the supervisors in charge of the 58 patrolmen, two firemen and two dump laborers (*Jones*, R. 10). All of these employees, including the 58 patrolmen, two firemen and two dump laborers, are carried on the company's payroll, are paid at an hourly rate, are paid at the same time, by the same procedures and subject to the same group benefit arrangements that are applied to the other employees of the company (*Jones*, R. 14).

The Steelworkers introduced in evidence a copy of its agreement with the respondent Jones & Laughlin, signed on December 11, 1942 (*Jones*, R. 12–13, 16–33), which mentioned plant protection employees only in one sentence, appearing in Section 1 and reading as follows (*Jones*, R. 16):

> The term "employee" as used in this Agreement, shall not include Foremen or Assistant Foremen in charge of any classes of labor, watchmen, salaried employees and nurses.

The representative of the Steelworkers stated its position to be that this agreement contained "nothing to prevent us from going ahead with organizing this group of people and bargaining for them separately" (*Jones*, R. 13).

The respondent Jones & Laughlin did not offer any evidence during the representation proceeding. Its counsel did make a statement for the record in which he read certain of the Articles of War which he asserted were applicable to plant guards (*Jones*, R. 10–11), and received permission to include a citation to the transcript of certain testimony before the House Military Affairs Committee respecting unionization of guards (*Jones*, R. 11–12).[1]

On May 3, 1943, the Board issued its decision and direction of election, in which it denied the company's motion to dismiss the petition (*Jones*, R. 52), found that "all patrolmen, watchmen, and firemen, including dump laborers, employed by the Company at its Otis Works, but excluding lieutenants, captains and supervisors" consfitute an appropriate unit (*Jones*, R. 54), and directed the

[1] While the trial examiner, without objection from the respondent, ordered that all of counsel's statement "beginning with the story of the plant guard having found a man asleep be physically expunged from the record—be stricken from the record and physically expunged from the record, except insofar as the right to cite the incident by page number in a transcript later to be used is reserved to the party", the record as printed contains counsel's statement in full (*Jones*, R. 11–12). A copy of the testimony which counsel was summarizing from memory was later supplied to the Board (see statement in the Board's decision, *Jones*, R. 52), but was never incorporated in the record. The testimony in question appears in Hearings before the Committee on Military Affairs, House, 78th Cong., 1st Sess., on H. R. 2239, H. R. 1742, H. R. 1728 and H. R. 992, pp. 161–172.

holding of an election to determine whether the employees in this unit desire to be represented by the Steelworkers (*Jones*, R. 54–55). The Board stated the company's contention and its reason for rejecting it as follows (*Jones*, R. 53–54):

> The Company maintains that such employees are not an appropriate unit, claiming that these employees should not be permitted to choose a collective bargaining agent since they are either sworn members of the auxiliary military police or under its control. However, the record discloses that although the employees in the proposed unit take the Army oath, they are under the control of the Company as to pay, conditions of employment, and benefits. We have frequently found that plant guards hired and paid by private employers, are employees within the meaning of the Act, and may designate a representative for the purposes of collective bargaining, even though they are members of the auxiliary military police (citing cases). Accordingly, the Company's contention is rejected.
>
> The Union already represents all production and maintenance employees of the Company under a contract dated December 2, 1942, and the employees in the unit proposed herein are specifically excluded from the benefits of the above-mentioned contract. However, the Union does not intend to merge the plant-protection employees with the unit for which it has already been recog-

nized as the exclusive bargaining agent, but intends to bargain for them as a separate unit. We have, on several occasions heretofore, permitted the same labor organization to bargain for the production and maintenance employees and the plant-protection employees in separate units (citing cases).

The election was held on May 26, 1943, at which time there were approximately 56 eligible voters, of whom 52 cast ballots, 37 for the Steelworkers and 15 against (*Jones*, R. 33). The Board, accordingly, on June 5, 1943, certified the Steelworkers as the exclusive representative of the employees within the unit found appropriate (*Jones*, R. 34–35).

After the Steelworkers had filed charges with the Board alleging that the respondent Jones and Laughlin had refused to bargain with it, the Board, on September 16, 1943, issued its complaint based thereon (*Jones*, R. 35–38). Respondent answered, admitting the allegations of the complaint except as to the appropriateness of the unit and the continuing character of its refusal to bargain (*Jones*, R. 38–41). It admitted that on June 23, 1943, it had refused to bargain with the Steelworkers, but alleged that its subsequent refusal to bargain was based on its desire to await the outcome of a case involving the plant guards at its Pittsburgh Works before taking a final position, and that, therefore,

its refusal to bargain was only qualified and conditional (*Jones*, R. 40).

At the hearing held on the complaint, none of the parties produced any witnesses but merely stipulated into the record certain documents. The Board, in support of its case, introduced the formal papers in the prior proceedings resulting in certification of the Steelworkers (*Jones*, R. 41–45, 52–55) and the following correspondence: A letter from the Jones & Laughlin Corporation addressed "To All Patrolmen, Watchmen, Firemen, and Dump Laborers at the Otis Works of Jones & Laughlin Steel Corporation" dated May 25, 1943, in which it is recited that the Board has directed an election among the plant guards; that the Company "has consistently maintained that supervisors and plant guards should not be included in bargaining units because both groups represent management", that the Board has ruled that supervisory employees cannot be a bargaining group, that "It is our intention to use every legal means available to us to secure a similar decision with respect to our plant guards" and that "Any plant guard who does not wish to continue as a part of management, who believes his interests require representation, and feels that he is more a part of the production and maintenance group than the management staff, will, upon request, be transferred to an equivalent production or mainte-

nance occupation" (*Jones,* R. 46–47, 57). A letter from the Steelworkers to the Company dated May 28, 1943, requesting bargaining and the reply of the Company dated June 23, 1943, in which the Company refused to bargain stating, "As you are well aware, the Corporation objected and still objects to the appropriateness of plant guards as a bargaining unit. * * * it is our intention to use every legal means available to us to have plant guards classified with Supervisors in respect to collective bargaining" (*Jones,* R. 45–46, 55–56).

At the hearing, the respondent Jones & Laughlin defended on the ground that it had not yet decided whether to bargain with the Steelworkers but still desired further time to consider the matter. In order to "elaborate" and "clarify" the allegation in its answer to this effect (*Jones,* R. 40, 47–50), the respondent introduced in evidence the following correspondence: A letter from the Board's field examiner to the Corporation dated August 44, 1943, stating that charges of refusal to bargain had been filed by the Steelworkers and inquiring whether the Corporation had definitely decided not to bargain with the Steelworkers as the representative of the plant guards at its Otis Works (*Jones,* R. 47, 58). A letter from the Corporation to the Board's field examiner, dated September 4, 1943, stating that the Corporation was awaiting decision by the Board of a case

respecting the plant guards at its Pittsburgh Works before taking a final position as to bargaining with representatives of its plant guards (*Jones*, R. 47–48, 59). Identical letters from the Corporation to each member of the Board dated September 7, 1943, making no reference to the case involving the plant guards at its Otis Works, but referring solely to the case involving the plant guards at its Pittsburgh Works, the essence of which letters appears in the following quotation (*Jones*, R. 50–51, 59–60):

> On August 31, 1943, the National Labor Relations Board upon petition of the United Steelworkers of America held a hearing in Pittsburgh, Pennsylvania, involving Plant Guards of the Pittsburgh Works of Jones & Laughlin Steel Corporation. The Corporation moved to dismiss the Petition because the Petitioner is the same labor organization that represents production and maintenance employees in all of its steel plants, including the Pittsburgh Works, and in the 1942 Agreement between the Corporation and the Union, now in force, watchmen or guards are specifically excluded, together with foremen, salaried employees and nurses.
>
> * * * * *
>
> The Corporation has given serious consideration to testing the appropriateness of a unit composed of Plant Guards in the U. S. Circuit Court of Appeals. How-

ever, corporate officials feel that they would like to have the benefit of oral argument before the Board and some discussion with Board members themselves prior to making a definite decision with regard to bargaining with certified representatives of Plant Guards.

Therefore, will you please consider this as a request for oral hearing before the Board and a further request that you as an individual Board member, grant representatives of the Corporation opportunity for discussion with you.

And a letter from the Board to the Corporation, dated September 11, 1943, entitled in the Pittsburgh plant guard case,[5] acknowledging receipt of the Corporation's letter of September 7 (*Jones*, R. 51, 61).

On October 5, 1943, the trial examiner issued his intermediate report reaffirming the appropri-

[5] On the Board's records, the instant cases involving the plant guards at the Otis Works bore the numbers 8–R–1056, and R–5143 for the representation case (*Jones*, R. 1, 2, 52, 62, 75, 76) and 8–C–1548 for the complaint case (*Jones*, R. 35, 41, 58, 59, 75, 76), whereas the case involving the plant guards at the Pittsburgh Works bore the number 6–R–770 (*Jones*, R. 61; see *Matter of Jones & Laughlin Steel Corp.*, 52 N. L. R. B. 975; *Matter of Jones & Laughlin Steel Corp.*, 21 War Lab. Rep. 240; *Jones & Laughlin Steel Corp.* v. *United Steelworkers of America*, 17 L. R. R. M. 854, dismissing complaint for declaratory judgment as to validity of certification of representatives for the plant guards at the Pittsburgh Works, which matter is now pending on appeal in the Court of Appeals for the District of Columbia. Case No. 9334, set for argument on March 11, 1947).

ateness of the unit and finding that the respondent Jones & Laughlin had refused to bargain collectively with the Steelworkers (*Jones*, R. 61–68). On November 4, 1943, the respondent filed exceptions to the intermediate report on the grounds that plant guards are employers within the meaning of Section 2 (2) of the Act and therefore not employees within the meaning of Section 2 (3) of the Act (*Jones*, R. 68–69) and that plant guards, because of their supervisory status, do not constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9 (b) of the Act (*Jones*, R. 69–70). On December 2, 1943, the Board issued its decision adopting the findings, conclusions and recommendations of the intermediate report, and entered its order requiring the respondent Jones & Laughlin to cease and desist from its unfair labor practices, to bargain collectively with the Steelworkers and to post the usual notices (*Jones*, R. 73–74).

Upon petition of the Board for enforcement (*Jones*, R. 76–79), the Circuit Court of Appeals for the Sixth Circuit, on December 8, 1944, issued its decision denying enforcement of the Board's order (*Jones*, R. 83–89). The court upheld the Board's determination that the plant protection employees here involved are employees within the meaning of the Act (*Jones*, R. 84–85). But it set aside the Board's determination of the appropriateness of the unit, holding that the Board, in the exercise of its "wide discretion in deter-

mining whether the units selected were appropriate" (*Jones*, R. 85) neglected to give "due regard to the national welfare" when it authorized respondent's militarized plant protection employees to join the same union as represented respondent's production and maintenance employees because "when they were inducted into the Unions and became subject to their orders, rules and decisions, the plant protection employees assumed obligations to the Unions and their fellow workers, which might well in given circumstances bring them in conflict with their obligation to their employers, and with their paramount duty as militarized police of the United States Government" (*Jones*, R. 88).

The Board filed a petition for rehearing in which it pointed out that its prior briefing of the case had been concerned with respondent's contention "that plant protection employees are not employees within the meaning of the Act" which had been the contention "primarily pressed upon the Board, rather than with the impact of the militarized status of plant protection employees upon the bargaining unit or the type of bargaining agency which the employees may select" (*Jones*, R. 90). In addition to arguing that the court below took an erroneous view with respect to these matters, the petition for rehearing stated that the Board had been informed by the Army that it was engaged in a policy of demilitarizing plant guards and had already demilitarized those employed at

the plants of Jones & Laughlin Corporation here involved (*Jones,* R. 93, n. 6). It also stated that, in accordance with the Steelworker's undertaking to bargain for the plant protection employees separately from the production employees, as stated at the hearing in the representation case (*Jones,* R. 13) and relied upon by the Board in its decision and direction of election (*Jones,* R. 54), the Board had been "informed by our Regional Office that the International Union, involved in the Jones & Laughlin case, chartered a separate local for plant protection employees" (*Jones,* R. 92). The court below denied the Board's petition for rehearing (*Jones,* R. 111).

The Board thereupon filed a petition for writ of certiorari to review the decision of the court below (No. 1237, October Term, 1944). In its petition the Board pointed out, *inter alia,* that on May 29, 1944, a date subsequent to the refusals to bargain, the plant protection employees at the plants here involved were demilitarized and were no longer members of the Auxiliary Military Police (Petition for Writs of Certiorari, Nos. 1236, 1237, 1238, October Term, 1944, p. 27). The Board urged that this fact should not be regarded as rendering moot either the Board's order or the question of the effect of militarization upon the employee status of the guards, since the guards were militarized at the time the refusals to bargain occurred, and unless the employers were then bound to bargain with the representatives of the guards,

there were no unfair labor practices and the Board's orders were invalid (*id.* at p. 28). The Board further suggested that the only effect of the demilitarization was to deprive the respondent of the future use of militarization as a defense for refusing to bargain. This Court granted the writ of certiorari, vacated the judgment below, and remanded the case to the circuit court of appeals "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved and the effect thereof on the Board's orders." 325 U. S. 838.

Pursuant to the remand, the respondent Jones & Laughlin and the Board entered into a stipulation respecting the dates and circumstances of the demilitarization of the guards (*Jones*, R. 114–118). It was stipulated that the "qualifications, strength, functions and duties of the plant guard force during the period of their militarization, were not materially different from" those existing subsequent to demilitarization or those existing prior thereto, except that during militarization the plant guards were subject to certain additional obligations (*Jones*, R. 117). Included also in the stipulation, though clearly beyond the terms of the remand and the issues open under it,[6] were facts showing that the plant guards of respondent Jones & Laughlin were, at all times relevant to these proceedings,

[6] The stipulation clearly reserved the right of all parties to contend that any of the facts contained therein are irrelevant to the issues in the proceedings (*Jones*, R. 114).

commissioned as private policemen of the City of Cleveland, and exercised "the legal powers of peace officers in their work as plant guards" (*Jones*, R. 115).[2]

The Board thereafter filed in the Circuit Court of Appeals for the Sixth Circuit a motion for a decree enforcing its order, pointing out that the demilitarization of the plant guards here involved removed the obstacles which that court, when the case was first before it, had believed warranted it in refusing to enforce the Board's order (*Jones*, R. 112–114). This motion was denied (*Jones*, R. 119–122). The court below held that not only the facts concerning demilitarization, but also the facts relating to the deputization of the guards which were embodied in the stipulation (*Jones*, R. 114–118), were to be considered as though they "had been presented at the hearing before the Board" (*Jones*, R. 120). The court thereby overruled the Board's contention that the facts concerning deputization could not properly be considered (*Jones*, R. 124–127). It further

[2] There is absolutely no basis in the record for the assertion made by the respondent Jones & Laughlin in its brief opposing the Board's petition for a writ of certiorari in this case (n. 3, pp. 4–5), that, during the period of militarization, the plant guards were not members of the municipal police force of the City of Cleveland. The stipulation shows that during the period of "militarization," the guards were subject "to their obligations as police" (*Jones*, R. 117, 115–116), and respondent so informed this Court in its opposition to the Board's petition for a writ of certiorari in No. 1237, October Term, 1944 (p. 6). Compare *Jones*, R. 124, n. 2.

held that the guards were "employees" within the meaning of the Act, but concluded that in view of the "drastic police powers" exercised by the guards, as shown by the stipulation, it was improper for the Board to permit their organization by the same union which represents the production employees" (*Jones*, R. 121).

II

The *Atkins* Case

On September 10, 1943, the International Association of Machinists, District 90 and their affiliate, Local 1683, hereinafter called the Machinists, filed with the Board a petition for investigation and certification of representatives pursuant to Section 9 (c) of the Act. The Machinists alleged that it represented the approximately 64 plant guards employed by E. C. Atkins and Company, hereinafter called the respondent Atkins (*Atkins*, R. 95–96). At the opening of the hearing on this petition, the respondent Atkins moved to dismiss the petition for the reason that the respondent Atkins "is not and cannot be an employer within the meaning of" Section 2 (2) of the Act "with respect to Auxiliary Military Police who wholly constitute the bargaining unit" requested in the petition and "further, for the reason that the employees referred to in such Petition cannot come within the definition of the word 'employees' under the provisions of" Sec-

tion 2 (3) of the Act with respect to the alleged employer, respondent Atkins (*Atkins*, R. 46). The evidence introduced at the hearing relevant to this issue may be summarized as follows:

Respondent Atkins, an Indiana corporation, at all material times, was engaged in the manufacture of saws, tools and armor plate at the two plants here involved, located at Indianapolis, Indiana (*Atkins*, R. 46).[8] These products were advertised for sale in industrial magazines and periodicals and were sold to jobbers, dealers, subcontractors, and direct to manufacturing consumers, as well as to the United States Government (*Atkins*, R. 47). The approximately 1,200 production and maintenance employees employed by the respondent Atkins at the two plants are covered by a union shop agreement between the company and the United Steelworkers of America, C. I. O., except that its 59 saw smiths are covered by a closed shop agreement between the company and Sawsmith's Local Union No. 18,548, A. F. L. (*Atkins*, R. 85–88, 162–174). The plant protection employees at both plants, like plant protection employees in many other "civilian plants" producing materials in which the Government was "directly interested" (Appendix B, *infra*, pp. 134, 140), were

[8] One of the two plants had been owned and operated by the company since 1857; the other plant, known as the "Fall Creek Ordnance Plant," was owned by the United States Government but operated by the company (*Atkins*, R. 46, 86).

enrolled as members of the civilian auxiliary to the military police (*Atkins*, R. 52, 59, 68–69, 88–89), a guard force established by the War Department as a security precaution for the protection of strategic premises and materials important to the prosecution of the war (*Atkins*, R. 59–60, 105–112).[9]

Respondent Atkins recruited the bulk of its guard force after the military authorities recommended that in order to fulfill the requirements for obtaining war contracts additional guards be hired (*Atkins*, R. 52, 54, 68, 85, 88–89). Its peacetime plant protection force consisted of between four and six watchmen (*Atkins*, R. 88). These watchmen, who had been in the employ of the company before the militarization program was instituted, were enrolled as civilian auxiliaries to the military police and remained on their jobs (*Atkins*, R. 88). The additional guards were hired through the usual employment channels of the respondent Atkins, that is by filling out the blank form of application for employment with respondent Atkins required of all prospective employees and being interviewed by the personnel manager (*Atkins*, R. 53, 58–59, 68–71, 80, 82, 91–92, 112–115). All of the watchmen,

[9] Approximately 200,000 plant guards throughout the country became members of the civilian auxiliary to the military police. Hearings before the Committee on the Judiciary, U. S. Senate, 78th Cong., 1st Sess., on S. 1227, p. 19. See *infra*, pp. 64–73.

those formerly employed as well as those newly hired, became members of the civilian auxiliary to the military police after they, as employees of respondent Atkins, entered into an agreement with the United States of America which recited that in consideration of their employment or the continuation of their employment by respondent Atkins they assumed certain additional obligations to the United States pertaining to policing property essential to the war effort (*Atkins*, R. 54–55, 59, 68–71, 80, 103–104). The only rank and file guard who testified at the hearing, when asked who had the authority to discharge him, answered that the personnel manager or the chief guard of respondent Atkins could (*Atkins*, R. 53–54). The chief guard and the personnel manager, while admitting that they could remove a guard at any time they so desired, pointed to Paragraph 25 of the directive on Auxiliary Police, issued by the Continuous Security District Office of the War Department, Cincinnati, Ohio, as limiting their authority (*Atkins*, R. 59–60, 72, 84, 89, 92, 109). Paragraphs 24 and 25 of this directive provide (*Atkins*, R. 59–60, 109):

> 24. Basically the militarization of the plant guard forces does not change the existing systems of hiring, compensation, and dismissal except as stated in paragraph 25. All remain, primarily, a matter between the guards and plant management. Guards in the employ of a private

employer may, as heretofore, be dismissed and those who were Civil Service employees in the employ of the War Department may be dismissed by the local commanding officer, in accordance with Civil Service Regulations. In neither case is a Court Martial necessary.

25. A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto. Inasmuch as the guards are under oath to the Army, the plant management may suspend a guard without pay pending approval of his dismissal by the District Plant Guard Officer and pending the termination of the guards enrollment as a member of the Auxiliary Military Police. This will usually be done on the management's recommendation unless an emergency requires the guard's retention.

Respondent Atkins carried the guards upon its regular pay rolls, unilaterally determined their rate of compensation, and paid their wages, after making appropriate pay roll deductions (*Atkins*, R. 53–54, 82, 85, 93).[10] The guard force was under the immediate supervision of a chief guard

[10] In the *Atkins* case, the record is clear that the cost of the guards' wages was borne by the company and not by the United States Government; the company did not operate on "a cost-plus basis" (*Atkins*, R. 332–333, 326–327).

and his lieutenants, all of whom were civilians (*Atkins,* R. 58, 62, 68–71, 77–79, 81–82). The chief guard at the Atkins plant testified that he was hired "at the personnel office" of the Company "to be chief subject to the approval of the Government" (*Atkins,* R. 82). The hours of work and work assignments of the individual guards were determined by civilian authority. The chief guard was given a more or less free hand by the respondent in his handling of the guards (*Atkins,* R. 78–82, 62). Thus, on his own initiative, he established a system of rotating shifts for the guard force (*Atkins,* R. 78–79), and, without consulting higher management, he promoted guards to supervisory positions on the guard force, at increased wages (*Atkins,* R. 82). The chief guard took such action without notifying or consulting military authorities (*Atkins,* R. 82). When asked who he recognized as his supervisor in addition to the chief guard and his four lieutenants, the only rank and file guard who testified at the hearing named Woods, personnel manager, and Atkins, general superintendent (*Atkins,* R. 62–63, 172, 173).

So far as the record shows, the only orders concerning the performance by the guards of their duties as civilian auxiliaries, which were transmitted to the chief guard by a District Plant Guard Officer stationed at the Continuous Security District office of the War Department at Cincinnati, were general orders applicable to

all militarized guards at all plants, not orders applicable only to the guards of respondent Atkins (*Atkins*, R. 73–76, 155–158). The chief guard, when asked by counsel for the Company (*Atkins*, R. 75),

> Q. Do you take any orders from Mr. Wood who sits here in the courtroom and is the personnel director of E. C. Atkins and Company?

answered

> A. Yes, naturally; I work very closely with Mr. Wood, as he is personnel director of the plant and there can be much more efficient guarding of the plant and operation of the plant if we do work closely. I have never taken an order as such from him.

Besides identifying as the only general orders which he had received from the Army, three orders applicable to all guard forces (*Atkins*, R. 73–74, 155–158) and admitting that his correspondence with the Army dealt largely with his reports on who had been hired for the guard force or had been laid off in order to be discharged therefrom (*Atkins*, R. 83–84), the chief guard testified that special orders to the guard force would in most instances "come from myself" (*Atkins*, R. 77–78). He testified that the members of the plant guard force would not take orders from the other supervisory personnel of respondent Atkins but would cooperate with any request in any way they could (*Atkins*, R. 77–78). The personnel

director likewise testified that he did not give orders respecting the plant guards but merely made recommendations to the chief guard as to what they should do (*Atkins*, R. 89–90).

Military officers did not oust the chief guard of his plenary authority as a supervisory employee of respondent Atkins over performance by the guards of their "ordinary protective duties." Indeed, the directive of the Continuous Security District Office of the War Department in Cincinnati, under which respondent Atkins operated, itself provided that at civilian operated plants no orders would be issued except after the "plant management has indicated its concurrence by signing the guard order in the lower lefthand corner", that a member of the Army "will be in command for purposes of instruction and drilling and, in particular, to take over the command of the force if and when an emergency justifying such action occurs" (*Atkins*, R. 59–60, 108–109). No emergency having arisen, the only direct contact which any of the employees, in the unit sought as appropriate, had with the military authorities was for the one hour a week of instruction which the guards received from the military authorities pursuant to the regulation (*Atkins*, R. 63, 79). This dealt with "Military Police subjects only" (*Atkins*, R. 79). Except as to this one hour a week, all of the direction of this guard force was by the usual channels of plant supervision in accordance

with the provisions in the directives of the district office of the War Department which provide that except for the one hour a week of military instruction and drill, and except in case of emergencies, the Army will exercise its authority only through the civilian guard supervision established by plant management (*Atkins,* R. 59–60, 62–63, 108–109, 111).

The only rank and file guard who testified at the hearing, when asked what do the "guards do", stated that "In general, they guard the plant, supposed to obey all the general orders and specific orders which the Company asks us to obey" (*Atkins,* R. 52). Thus, guards were required generally to watch the plant gates and identify employees entering or leaving the plant, inspect all packages carried into or out of the plant, carry cash to different places in the plant, keep a lookout for fire hazards, and, in short, to police the plant premises with a view to preventing sabotage or destruction of property (*Atkins,* R. 52–53, 76, 80, 88). While on duty the guards wore uniforms and were armed with a revolver which, under the directive of the district office of the War Department, the respondent Atkins was obligated to furnish (*Atkins,* R. 52, 59–60, 78, 110).

Local 1683 of the Machinists, the petitioning union, is a local composed solely of plant protection employees (*Atkins,* R. 63). It admits to membership plant protection employees of other

employers as well as those in the employ of E. C. Atkins and Company and has contracts with Curtis Wright Corporation, Merz Company, Marmon-Harrington Company, and International Machine Tool Company covering plant protection employees (*Atkins*, R. 60–61, 65–66).

Upon the basis of the foregoing evidence, the Board on October 19, 1943, issued its decision and direction of election determining that the plant guards in question, despite their status of civilian auxiliaries to the military police, were employees within the meaning of Section 2 (3) of the Act, that "all plant guards at the Company's two Indianapolis plants, excluding the chief and lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees, or effectively recommend such action" constituted an appropriate unit, and directing an election to determine whether or not the employees within the unit found appropriate desire to be represented by the Machinists for the purposes of collective bargaining (*Atkins*, R. 5–8). On November 17, 1943, in the election conducted by the Board, of the approximately 56 persons eligible to vote, 55 ballots were cast of which 50 were cast for the Machinists and 5 against (*Atkins*, R. 16). The Board, accordingly, on November 29, 1943, certified the Machinists as the exclusive representative of the plant guards in the unit found appropriate (*Atkins*, R. 17).

Thereafter, the Machinists filed charges that the respondent Atkins had refused to bargain collectively, the Board issued a complaint thereon and held the usual hearing (*Atkins*, R. 288–291). The only additional evidence received at this hearing pertained to the request for and refusal of the respondent Atkins to grant collective bargaining to the Machinists (*Atkins*, R. 269–319). Thereafter, the Board on May 30, 1944, issued its decision in which it made the following findings with respect to the employee status of the guards: [11]

The guards are interviewed for employment by the respondent and not by the United States of America and are hired by the respondent (*Atkins*, R. 31; 53, 58–59, 68–71, 80–82, 91–92). Their discharge is ordinarily initiated by the respondent (*Atkins*, R. 31; 59–60, 72, 84, 89, 92, 109). During their employment they are paid by the respondent, at rates set by the respondent and not by the United States of America (*Atkins*, R. 31; 53–54, 82, 85, 93). The chief guard works very closely and cooperates with respondent's representatives (*Atkins*, R. 31; 75, 78, 89). Admittedly, the respondent can temporarily suspend a guard from duty (*Atkins*, R. 31; 53–54, 72, 81, 84). Wood, the respondent's personnel director, referred to the guards as respondent's employees and testified that the respondent makes the neces-

[11] In the following paragraph the references preceding the semicolon are to the Board's decision; succeeding references are to the supporting evidence.

sary pay-roll deductions before paying them their wages (*Atkins*, R. 31; 85).

Upon the basis of these findings, the Board concluded (*Atkins*, R. 32):

> It is true that for reasons of national security the respondent may have surrendered to the military authorities many of the attributes of control which it would normally possess over its plant guards. It is clear, however, that the respondent still retains a sufficient residual measure of control over the terms and conditions of employment of the guards so that the guards should not be deprived of the rights guaranteed in the Act. Under the circumstances and upon the entire record, we find, as we did in the preceding representation case, that the guards are employees of the respondent.

The Board also found that the respondent Atkins had, on December 20, 1943, and at all times thereafter, refused to bargain collectively with the Machinists as the exclusive representative of the plant guards in the unit found appropriate, thereby engaging in unfair labor practices within the meaning of Section 8 (5) and (1) of the Act (*Atkins*, 30–42). The Board accordingly ordered the respondent Atkins to cease and desist from its unfair labor practices, upon request to bargain collectively with the Machinists, and to post appropriate notices (*Atkins*, R. 32–33).

The Board filed a petition for enforcement of its

order against respondent Atkins in the Circuit Court of Appeals for the Seventh Circuit (*Atkins*, R. 337–339). The court refused to enforce the Board's order primarily on the ground that militarized guards were not "employees" within the meaning of the Act (*Atkins*, R. 348–366).

The Board filed a petition for a writ of certiorari to review this decision (No. 1238, October Term, 1944). In its petition, the Board noted that the guard force at one of the Atkins plants here involved had been demilitarized on January 6, 1944, and the other on March 7, 1944 (Petition for Writs of Certiorari, No. 1238, October Term, 1944, p. 27). As in the *Jones & Laughlin* case (pp. 19–20 *supra*) the Board urged that the demilitarization did not render the case moot. This Court granted the writ of certiorari, vacated the judgment below, and remanded the case to the Circuit Court of Appeals for the Seventh Circuit "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved and the effect thereof on the Board's orders." 325 U. S. 838.

Pursuant to the remand, the Board and the respondent Atkins entered into a stipulation respecting the dates and circumstances of the demilitarization of the guards here involved (*Atkins*, Stipulation). Included also in the stipulation, though clearly beyond the terms of the remand and the issues open under it, were facts

showing that the plant guards of the respondent Atkins had been "sworn in as Deputy Policemen by the City of Indianapolis" (*Atkins*, Stipulation, p. 11). The stipulation reserved the right of the Board to contend that any of the facts contained therein were irrelevant to the issues in the proceeding (*Atkins*, Stipulation, p. 12).

The Board thereafter filed in the Circuit Court of Appeals for the Seventh Circuit a motion for a decree enforcing its order, which was denied (*Atkins*, R. 320-322). The court held that "the facts relative to the changed status of the plant guards by reason of their demilitarization * * * are irrelevant to * * * our decision that the plant guards were not [at the time of the refusal to bargain] employees of respondent within the meaning of the Act" (*Atkins*, R. 321), and reaffirmed that holding.

SPECIFICATION OF ERRORS TO BE URGED

In the *Atkins* case, the Circuit Court of Appeals for the Seventh Circuit erred:

1. In holding that guards who are members of the civilian auxiliary to the military police are not employees within the meaning of the Act.

2. In holding that the Board's findings of fact concerning the economic relation between the guards and E. C. Atkins and Company are not supported by substantial evidence.

3. In holding that "since 1941, respondent has

been engaged exclusively in the manufacture of armor plate for the federal government."

4. In holding that "respondent was reimbursed by the government for all costs accrued in the manufacture of war material, including that of compensation paid to the guards."

5. In holding that "it makes no difference whether they [the militarized guards] were paid by respondent or by the government."

6. In holding that the authority to hire and discharge a militarized guard was solely the prerogative of the military, and that respondent's authority was limited to making recommendations for such action.

7. In holding that the War Department regulations leave "little room for the contention that respondent had the right but failed to exercise control" over the militarized guards and that "all authority and control was taken over by the Army and none was exercised by respondent."

8. In holding that a producer of war materials for the United States Government, whose labor costs are reimbursed by the Government, cannot be found to be an employer within the meaning of the Act.

9. In failing to give any weight to the Board's determination, based on its settled policy, that, despite their militarization, plant guards are employees of respondent within the meaning of the Act and are entitled to exercise the collective

bargaining rights guaranteed by the Act, and in substituting its own inferences and judgment for those of the Board with respect to the guards' employment status.

10. In setting aside and denying enforcement to the Board's order.

In the *Jones & Laughlin* case the Circuit Court of Appeals for the Sixth Circuit erred:

1. In considering facts concerning the private police status of the guards which were never presented to the Board.

2. In passing upon the question whether, because of their militarization and deputization, the plant guards should be permitted to bargain through a labor organization also representing a separate unit of the employer's production and maintenance employees, no such question having been raised before the Board.

3. In holding that it would not effectuate the policies of the Act and would be against the public interest, to permit an employer's plant protection employees, who constitute an appropriate bargaining unit, and who are members of the civilian auxiliary to the military police, and who are deputized as police officers by local authorities, to bargain collectively with the employer through a union which also represents a separate bargaining unit of other employees of the same employer.

4. In failing to give any weight to the Board's determination and settled administrative policy that the bargaining pattern described in the pre-

ceding paragraph effectuates the policies of the Act, and in substituting its own judgment for that of the Board with respect to the propriety of such bargaining pattern.

5. In holding that, under Section 9 (b) of the Act, the Board is empowered to decide whether a union selected by a majority of employees is "appropriate."

6. In holding that the Board failed to give adequate consideration to the public interest in view of the war.

7. In setting aside and denying enforcement to the Board's order.

SUMMARY OF ARGUMENT

I

The Board properly determined that the plant guards here involved are employees within the meaning of Section 2 (3) of the Act. Except for their militarization and deputization, they differed in no respect from ordinary watchmen, patrolmen, gatemen, firemen and guards who for years have enjoyed membership in unions and coverage by collective bargaining contracts. They have no duties of a supervisory character. They have no subordinates. Their contact with production and maintenance employees is limited to reporting activities which injure the plant, its equipment or personnel as, for instance, theft or sabotage. Membership of plant guards in a union will in no wise jeopardize the full freedom of

any other employee to join or not join a union. Nor does membership of a plant guard in a union subject the employer to any risk of being held for acts of a guard on the ground that they jeopardize the neutral position the employer must maintain as to the production and maintenance employees in regard to all matters of organizational activity. It has never been held that an employer vests in a guard any economic power by reason of which an employer is to be deemed guilty of an unfair labor practice because of any anti-union or pro-union conduct of a guard unless that conduct was shown to have been authorized or ratified by the employer.

The plant guard is as much in need of collective bargaining as any employee who is concededly covered by the Act. There is nothing in his status as a guard which lends strength to his position when he bargains about his wages, hours or conditions of employment. His individual bargaining power is so weak that the employer, in effect, unilaterally fixes the terms of the bargain unless the guard resorts to self-organization and collective bargaining.

There is no reason to assume that statutory recognition of a plant guard's collective bargaining rights will make him less loyal to his employer in executing all legitimate tasks which his employer may assign him. The Board has certified unions as the collective bargaining representative of plant guards in several hundred cases over the past eleven years

without any evidence that any impairment of the employer's legitimate interests has resulted.

Militarization of the guards did not alter their status as employees of private employers nor does it remove the guards from the protection of the Act. The War Department regulations under which plant guards were enrolled as civilian auxiliaries of the military police were premised on the assumption that the guards remained in the employ of the civilian war contractor. The regulations expressly provided that hiring, dismissal and payment of wages remained a private matter between the guard and his employer. They likewise provided that, except for one hour a week of military drill and except in the event of an emergency, all control of the militarized guard should be through the usual channels of plant supervision. And, finally, the regulations expressly provided that the guards retained the full right to bargain collectively with but one proviso: that the military preferred that the guards bargain as a *unit* separate from the production and maintenance employees. The regulations went on to say, however, that the bargaining for the guards might be carried on by the same trade *union* which represented the other employees.

There is nothing in the records in either the *Jones & Laughlin* case or the *Atkins* case to indicate that any departure from either the letter or the spirit of the War Department regulations

took place as respects the manner in which the militarization of the guards was effectuated in their plants. Although the respondent Atkins was required to enlarge its previous staff of four to six watchmen by recruiting some fifty additional guards, the employment of all the guards was effectuated through the respondent Atkins' personnel office. The respondent Atkins continued to determine unilaterally and without any direction from the military, the rate of pay of both its former watchmen who became civilian auxiliaries and the new employees hired to supplement the guard force. While the respondent Atkins delegated to its chief guard, a civilian, full power to set the hours of work for the guard force and to make promotions to supervisory positions on the force, he executed these duties without consulting the military. This delegation did not divest the respondent of any of the attributes of its status as employer of the guards. Nor did the fact that, except for several general orders from the military authorities, the chief guard was left by the higher supervisory personnel of the respondent Atkins to exercise plenary control over the guards, render the respondent Atkins any the less the employer of the guards.

Militarization did not make it improper for the guards in the *Jones & Laughlin* case to be represented in collective bargaining by the Steelworkers even though the Steelworkers also repre-

sented the production and maintenance employees of the respondent Jones & Laughlin. The Board gave full effect to the War Department regulations when it placed the guards in a unit separate from the unit of production and maintenance employees. This practice of the Board received the express endorsement of the War Department. Thus, in refusing to enforce the Board's order because the guards were represented by the same union as represented production and maintenance employees, the Circuit Court of Appeals for the Sixth Circuit failed to give proper weight to the administrative judgment not only of the National Labor Relations Board but also of the War Department. These two agencies both determined that the war effort would be furthered, not hindered, were militarized plant guards to be accorded the full rights of collective bargaining through the union of their own choice. The court also construed the National Labor Relations Act as empowering the Board or the courts to impose a limitation on the union which plant guards could choose. The Board does not believe that the Act can be so construed. The Act is explicit that employees are to be free to choose any representative they may desire.

Deputization of plant guards does not alter their status as private employees nor deprive them of the full right to bargain collectively through the same union as represents the employer's other employees. Courts have uniformly

recognized in other contexts that private guards do not lose their status as private employees when they become special police officers of the state or municipality by deputization. It is generally recognized that this practice is one which has grown up to enable employers to achieve greater power to protect their plants. But it has never been thought that the employer of the guard who became deputized should be able to avoid the full responsibilities of his position as an employer. The Board has consistently held that guards who were deputized retained all their rights under the Act. No feature of the deputization of guards is inconsistent with the exercise by guards of the rights of self-organization and collective bargaining.

II

Demilitarization did not render either the Board's orders or the questions presented in these cases moot. The orders are continuing. They direct the employers to bargain collectively. They can still operate. And in order to determine their validity it is necessary to decide whether the employers committed unfair labor practices by their refusals to bargain at a time when the guards were militarized.

III

In the *Jones & Laughlin* case, the court below should not have considered the issues arising out of the deputization of the guards and out of the

fact that while they were militarized they sought to bargain through the same union as represented other employees of their employer, because these issues were never presented to the Board as required by Section 10 (e) of the Act.

ARGUMENT

INTRODUCTION

Resort by plant guards to the National Labor Relations Board for protection in the exercise of their basic right to self-organization and collective bargaining has given rise, in numerous cases, to the question of whether the status and duties of plant guards as they affect production employees remove such guards from the ambit of the statutory definition of "employee" contained in Section 2 (3) of the Act; whether, because of such status or duties, plant guards, if deemed employees, are nevertheless to be denied the right to select as their bargaining representative the same labor organization which represents the employer's production employees; whether deputization of plant guards as special officers by local or state authorities, or militarization of such guards pursuant to the War Department program removes the guards from the protection of the Act or should result in curtailment of their freedom of choice of bargaining representatives. We believe, and shall argue below, that some of these questions are not properly presented in the instant cases. Nevertheless, in order that this Court may have a com-

plete picture of the status of plant guards under the National Labor Relations Act, we shall first discuss all of the questions on the merits.

I

THE BOARD COULD PROPERLY DETERMINE THAT THE PLANT GUARDS ARE EMPLOYEES OF THE RESPECTIVE COMPANIES WITHIN THE MEANING OF THE ACT

A. ABSENT MILITARIZATION AND DEPUTIZATION, THE BOARD COULD PROPERLY FIND THAT PLANT GUARDS ARE "EMPLOYEES" WITHIN THE MEANING OF SECTION 2 (3)

The records in the instant cases show that the persons included within the units found appropriate perform only the usual functions of gatemen, patrolmen, watchmen, guards and firemen.[12] In the *Jones & Laughlin* case, the unit includes only "patrolmen", "watchmen", "firemen", and "dump laborers" and excludes "lieutenants, captains and supervisors" (*Jones*, R. 54). It is conceded that the sole duty of those in the unit is to protect plant and property (*Jones*, R. 8–10). In the *Atkins* case, the unit includes only "plant guards" and excludes "the chief and lieutenants, and all other supervisory employees with authority to hire, promote, discharge, or effectively recommend such action" (*Atkins*, R. 7). The testimony shows that some of these plant guards perform the functions of gatemen for they inspect all persons, vehicles and packages going into or coming

[12] Compare the definitions from the Dictionary of Occupational Titles set forth in Appendix C, *infra*, pp. 160–162. See also *The Watchman's Handbook*, published by the American District Telegraph Co. (New York, 1940).

out of the plants (*Atkins*, 52–53, 62, 76–77), while others of the guards perform such duties as carrying cash to different parts of the plant and maintaining general surveillance over the plant and property to detect fires and suspicious circumstances and to prevent sabotage (*Atkins*, R. 52, 80, 88). Persons performing such duties have for years been members of various labor unions. In the building trades, the American Federation of Labor has treated watchmen and guards as part of the craft included within the jurisdiction of the International Hod Carriers', Building and Common Laborers' Union of America.[13]

Outside of the building trades, the American Federation of Labor has conferred jurisdiction on the Building Service Employees' International Union of "Watchmen and Guards in buildings and industrial plants, including those used for fire prevention."[14] The National Association of Post Office and Railway Mail Laborers, A. F. of L., has jurisdiction of "any person in the postal service classified as a watchman."[15] The Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, A. F. of L., has jurisdiction of "guards" and "watchmen" employed by electric or motor transportation systems.[16] The unions which organize on an indus-

[13] Florence Peterson, *Handbook of American Labor Unions* (1944), pp. 163–164.

[14] *Id.* at p. 73.

[15] *Id.* at p. 293.

[16] *Id.* at p. 368.

trial basis usually include watchmen and guards along with the production, maintenance and other employees, without specific reference to these groups in their constitutions.[17] The National Labor Relations Board, in more than a hundred cases, has expressly included guards or watchmen in units of production and maintenance employees.[18] In those cases in which the Board has excluded guards or watchmen from such units, it has been out of deference to the union's wishes and

[17] See *Matter of Sweet Candy Co.*, 5 N. L. R. B. 541, 542. However, the Tobacco Workers International Union, A. F. of L., expressly lists "watchmen" in its constitutional definition of its jurisdiction. Peterson, *op. cit.*, at pp. 383, 384. The only union not affiliated with the American Federation of Labor, other than those whose membership is limited to one employer, which expressly mentions watchmen or guards in its constitution is the International Airline Mechanics Association, Independent, which includes "guards." *Id.* at p. 18.

[18] *Matter of Westinghouse Airbrake Co.*, 4 N. L. R. B. 403, 408; *Matter of Sweet Candy Co.*, 5 N. L. R. B. 541, 544; *Matter of J. G. McDonald Chocolate Co.*, 5 N. L. R. B. 547, 550; *Matter of Holland Reiger Division of Apex Electric Co.*, 6 N. L. R. B. 156, 158–159; *Matter of American Hair & Felt Co.*, 6 N. L. R. B. 648, 651–652; *Matter of Singer Mfg. Co.*, 8 N. L. R. B. 434, 437; *Matter of Aluminum Ore Co.*, 8 N. L. R. B. 914, 917; *Matter of Clifton Mfg. Co.*, 9 N. L. R. B. 13, 16; *Matter of The Electric Auto-Lite Co.*, 9 N. L. R. B. 147, 151, 153; *Matter of Merrimack Mfg. Co.*, 9 N. L. R. B. 173, 177; *Matter of A. Fink and Sons Co., Inc.*, 9 N. L. R. B. 441, 444; *Matter of Consumers Power Co.*, 9 N. L. R. B. 742, 748, 749; *Matter of Alaska Juneau Gold Mining Co.*, 9 N. L. R. B. 755, 758; *Matter of Lincoln Mills of Alabama*, 9 N. L. R. B. 778, 780; *Matter of Willys Overland Motors, Inc.*, 9 N. L. R. B. 924, 931–933; *Matter of Pacific Mills*, 10 N. L. R. B. 26, 30; *Matter of Libbey-Owens-Ford Glass Co.*, 10 N. L. R. B. 1470, 1473, 1478; *Matter of Illinois Knitting*

Co., 11 N. L. R. B. 48, 52; *Matter of Hawthorne Paper Co.*, 12 N. L. R. B. 43, 45; *Matter of American Petroleum Co.*, 12 N. L. R. B. 688, 713; *Matter of Ohio Brass Co.*, 13 N. L. R. B. 72, 76; *Matter of Naumkeag Steam Cotton Co.*, 13 N. L. R. B. 513, 518–520; *Matter of Vanadium Corp. of America*, 13 N. L. R. B. 836, 839; *Matter of La Plant-Choate Mfg. Co., Inc.*, 13 N. L. R. B. 1228, 1231; *Matter of Coos Bay Lumber Co.*, 14 N. L. R. B. 1206, 1211; *Matter of Armour & Co.*, 15 N. L. R. B. 268, 273, 275; *Matter of Kelsey Hayes Wheel Co.*, 16 N. L. R. B. 580, 582–583; *Matter of Newark Rivet Works*, 18 N. L. R. B. 520, 523; *Matter of Theuer Wagon Works, Inc.*, 18 N. L. R. B. 837, 850; *Matter of Blue Bell-Globe Mfg. Co.*, 22 N. L. R. B. 961, 964; *Matter of French Paper Co.*, 22 N. L. R. B. 1054, 1056; *Matter of Brown Shoe Co., Inc.*, 22 N. L. R. B. 1080, 1091–1092; *Matter of Westinghouse Electric & Mfg. Co.*, 23 N. L. R. B. 521, 523; *Matter of West Kentucky Coal Co.*, 24 N. L. R. B. 863, 869–870; *Matter of Lee Rubber & Tire Corp.*, 24 N. L. R. B. 1077, 1082; *Matter of Gettysburg Furniture Co.*, 25 N. L. R. B. 1109, 1112–1114; *Matter of Moulton Ladder Mfg. Co.*, 27 N. L. R. B. 40, 42–43; *Matter of Rickert Rice Mills, Inc.*, 27 N. L. R. B. 466, 468–469; *Matter of Eagle Oil & Refining Co.*, 27 N. L. R. B. 1003, 1007; *Matter of American Cyanamid Co.*, 27 N. L. R. B. 1176, 1178, 1181; *Matter of Southern Cement Co.*, 28 N. L. R. B. 596, 598; *Matter of Shaw Lumber Co.*, 28 N. L. R. B. 818, 822–823; *Matter of Saticoy Lemon Ass'n*, 28 N. L. R. B. 1214, 1216; *Matter of Solvay Process Co.*, 29 N. L. R. B. 24, 28, 31; *Matter of Trojan Powder Co.*, 29 N. L. R. B. 229, 232–233; *Matter of Pullman-Standard Car Co.*, 29 N. L. R. B. 600, 602–603; *Matter of Gutmann & Co., Inc.*, 30 N. L. R. B. 1, 4; *Matter of Continental Mills*, 30 N. L. R. B. 82, 84–85; *Matter of Mary Leila Cotton Mills, Inc.*, 30 N. L. R. B. 238, 240; *Matter of Solvay-Process Co.*, 30 N. L. R. B. 264, 266; *Matter of National Copper and Smelting Co.*, 30 N. L. R. B. 973, 975–976; *Matter of Goodrich Electric Co., Inc.*, 30 N. L. R. B. 979, 982; *Matter of Libby-Owens-Ford Glass Co.*, 31 N. L. R. B. 243, 248; *Matter of General Chemical Co.*, 31 N. L. R. B. 413, 416; *Matter of Mack-International Motor Truck Corp.*, 31 N. L. R. B. 424, 428; *Matter of Moulton*

Ladder Mfg. Co., 31 N. L. R. B. 665, 668; *Matter of American Cyanamid & Chemical Corp.*, 31 N. L. R. B. 883, 885; *Matter of Westinghouse Electric & Mfg. Co.*, 32 N. L. R. B. 274, 276; *Matter of The Quaker Oats Co.*, 32 N. L. R. B. 312, 315–316; *Matter of Jerry and Edythe Belanger*, 32 N. L. R. B. 1276, 1278–1279; *Matter of Robins Dry Dock & Repair Co.*, 33 N. L. R. B. 15, 18–19; *Matter of Whiterock Quarries, Inc.*, 33 N. L. R. B. 145, 147; *Matter of Turner Day and Woolworth Handle Co., Inc.*, 33 N. L. R. B. 1220, 1222–1223; *Matter of Bryce Brothers Co.*, 34 N. L. R. B. 255, 257; *Matter of The Lehon Co.*, 34 N. L. R. B. 313, 315–316; *Matter of Sullivan Mining Co.*, 36 N. L. R. B. 107, 110–113; *Matter of Tucker Duck & Rubber Co., Inc.*, 36 N. L. R. B. 132, 134, 136; *Matter of Ideal Seating Co.*, 36 N. L. R. B. 166, 168; *Matter of Houde Engineering Corp.*, 36 N. L. R. B. 587, 590; *Matter of Arkwright Corp.*, 36 N. L. R. B. 687, 691; *Matter of Fruit Growers Supply Co.*, 36 N. L. R. B. 959, 961; *Matter of Indiana Brass Co.*, 36 N. L. R. B. 966, 970; *Matter of Sculler Safety Corp.*, 36 N. L. R. B. 1160, 1162; *Matter of John Yasek*, 37 N. L. R. B. 156, 158, 160; *Matter of Buxton Dixie Corp.*, 37 N. L. R. B. 432, 434; *Matter of Diamond Crystal Salt Division of General Foods Corp.*, 37 N. L. R. B. 481, 484; *Matter of F. M. Bohannon Tobacco Co.*, 37 N. L. R. B. 526, 528; *Matter of Peerless Novelty Co.*, 37 N. L. R. B. 622, 624; *Matter of Link-Belt Speeder Co.*, 37 N. L. R. B. 889, 891–892; *Matter of The Edward Valve & Mfg. Co.*, 38 N. L. R. B. 428, 431; *Matter of South Portland Shipbuilding Corp.*, 39 N. L. R. B. 485, 487; *Matter of MacAndrews & Forbes Co.*, 39 N. L. R. B. 699, 703–704; *Matter of Philip Carey Mfg. Co.*, 39 N. L. R. B. 769, 772–773; *Matter of Little Rock Furniture Mfg. Co.*, 39 N. L. R. B. 892, 894; *Matter of Superior Coach Corp.*, 39 N. L. R. B. 926, 931; *Matter of Pacific Gas & Electric Co.*, 40 N. L. R. B. 591, 603–604; *Matter of Republic Creosoting Co.*, 40 N. L. R. B. 615, 617–618; *Matter of American Brake Shoe & Foundry Co.*, 41 N. L. R. B. 82, 84; *Matter of Farmington Shoe Mfg. Co.*, 41 N. L. R. B. 169, 170; *Matter of Gibbs Gas Engine Co.*, 42 N. L. R. B. 272, 276–277; *Matter of Lookout Oil & Refining Co.*, 42 N. L. R. B. 560, 562–563; *Matter of Flintkote Co.*, 42 N. L. R. B. 929, 931–932; *Matter of McKesson & Robbins*,

often over the objection of the employer.[19] In a number of other cases, the Board has found the employer guilty of an unfair labor practice because of discriminatory discharges of guards or watchmen.[20] In none of these cases was it even contended that

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Inc., 42 N. L. R. B. 1297, 1299; *Matter of New Indiana Chair Co.*, 43 N. L. R. B. 318, 319–320; *Matter of Baer Bros.*, 43 N. L. R. B. 1267, 1269; *Matter of A. P. Steiner*, 42 N. L. R. B. 1384, 1387; *Matter of Luders Marine Construction Co.*, 44 N. L. R. B. 214, 216; *Matter of Hamrick Mills*, 44 N. L. R. B. 238, 239–241; *Matter of Farrar & Trefts, Inc.*, 44 N. L. R. B. 678, 679; *Matter of North Carolina Finishing Co.*, 44 N. L. R. B. 681, 684; *Matter of Colorado Portland Cement Co.*, 45 N. L. R. B. 197, 199; *Matter of Gluck Bros., Inc.*, 45 N. L. R. B. 1159, 1161; *Matter of Bell Telephone Laboratories* 55 N. L. R. B. 87, 89–90; *Matter of Commonwealth Edison Co.*, 55 N. L. R. B. 732, 733; *Matter of Luscombe Airplane Corp.* 69 N. L. R. B. 479, 481, 482; *Matter of E. I. duPont de Nemours & Co.*, 69 N. L. R. B. 509, 519.

[19] *Matter of Federal Fibre Mills*, 15 N. L. R. B. 256, 259; *Matter of American Tobacco Co.*, 2 N. L. R. B. 198, 205, 206; *Matter of General Mills, Inc.*, 3 N. L. R. B. 730, 738; *Matter of International Harvester Co.*, 5 N. L. R. B. 192, 197; *Matter of Woodside Cotton Mills Co.*, 7 N. L. R. B. 960, 962; *Matter of Yates-American Machine Co.*, 10 N. L. R. B. 786, 789; *Matter of Burton Dixie Corp.*, 10 N. L. R. B. 1417, 1419; *Matter of Cayuga Linen & Cotton Mills, Inc.*, 11 N. L. R. B. 1, 3; *Matter of Bethlehem Shipbuilding Corp.*, 11 N. L. R. B. 105, 137; *Matter of Automotive Maintenance Machinery Co.*, 13 N. L. R. B. 338, 349–350; *Matter of Bremner Bros.*, 39 N. L. R. B. 763, 765.

[20] *Matter of Crossett Lumber Co.*, 8 N. L. R. B. 440, 458–459, 467–468, 478–479, 480–481, 488–489; *Matter of Lansing Co.*, 20 N. L. R. B. 434, 444–445; *Matter of Budd Wheel Co.*, 49 N. L. R. B. 1350; *Matter of Tampa Shipbuilding Co.*, 50 N. L. R. B. 177; *Matter of Ford Motor Co.*, 50 N. L. R. B. 534; *Matter of Zenith Optical Co.*, 53 N. L. R. B. 252, 270; *Matter of Ingalls Iron Works Co.*, 58 N. L. R. B. 1202

guards or watchmen were not employees within the meaning of the Act.

In the iron and steel industry, the Steelworkers, in establishing its first bargaining relationships, did not include watchmen or guards within the unit of production and maintenance employees which it sought to represent. The contracts between the respondent Jones and Laughlin and the Steelworkers (*Jones*, R. 13, 16–32), and between the respondent Atkins and the Steelworkers (*Atkins*, R. 86–87, 162–171), excluding from their coverage plant protection employees, represent the typical situation in the steel industry.[21] The explanation for this development can probably be found in Board cases which showed that many companies in this industry in 1936 and 1937 used their guards for anti-

[21] *Matter of Pittsburgh Steel Co.*, 1 N. L. R. B. 256, 263; *Matter of Crucible Steel Co.*, 1 N. L. R. B. 545; *Matter of Bendix Products Corp.*, 1 N. L. R. B. 173; *Matter of Crucible Steel Co.*, 2 N. L. R. B. 298, 304–305; *Matter of Interlake Iron Corp.*, 2 N. L. R. B. 1036, 1039–1041; *Matter of The Greer Steel Co.*, 4 N. L. R. B. 333, 336; *Matter of R. C. Mahon Co.*, 5 N. L. R. B. 257, 260; *Matter of Interlake Iron Corp.*, 6 N. L. R. B. 780, 785–786; *Matter of Calumet Steel Division of Borg-Warner Corp.*, 7 N. L. R. B. 340, 345–346; *Matter of Burnside Steel Foundry Co.*, 7 N. L. R. B. 714, 718–720; *Matter of Moline Iron Works*, 9 N. L. R. B. 664, 670; *Matter of Calumet Steel Division of Borg-Warner Corp.*, 23 N. L. R. B. 114, 126–127; *Matter of Virginia Bridge Co.*, 29 N. L. R. B. 241, 243; *Matter of The Colorado Fuel & Iron Corp.*, 29 N. L. R. B. 541, 544. In the following case the exclusion of watchmen from the unit was objected to by the employer: *Matter of Inland Steel Co.*, 9 N. L. R. B. 783, 788–790.

union purposes.[22] As time has begun to erase the bitter feelings of those days, we find the guards in steel joining the Steelworkers,[23] or oth[illegible] unions.[24]

The respondent Jones & Laughlin, in its motion to dismiss the petition for certification and in its exceptions to the intermediate report, took the position that the members of its plant protection force are part of management and therefore employers within the meaning of Section 2 (2) of the Act instead of employees within the meaning of Section 2 (3) of the Act (*Jones*, R. 5–8, 69–70). It offered no evidence, however, to show what, if any duties, its patrolmen, watchmen, firemen and dump laborers had which made them a part of management. Indeed, plant

[22] See *Matter of Jones & Laughlin Steel Corp.*, 1 N. L. R. B. 502, 511, 512, enforced, 301 U. S. 1; *Matter of Republic Steel Corp.*, 9 N. L. R. B. 219, 240–241, 262, 360–362, 368, 373–374, enforced 107 F. 2d 472 (C. C. A. 3), certiorari denied, 309 U. S. 684; *Matter of Weirton Steel Corp.*, 32 N. L. R. B. 1145, 1163–1175, enforced, 135 F. 2d 494 (C. C. A. 3); *Matter of American Rolling Mill Co.*, 43 N. L. R. B. 1020, 1058–1060.

[23] Besides the instant *Jones & Laughlin* case, see *Matter of Bethlehem Steel Co.*, 46 N. L. R. B. 794; *Matter of Youngstown Sheet & Tube Co.*, 47 N. L. R. B. 391; *Matter of Pressed Steel Car Co.*, 47 N. L. R. B. 425; *Matter of Consolidated Steel Corp.*, 51 N. L. R. B. 333; *Matter of American Steel & Wire Co.*, 51 N. L. R. B. 440; *Matter of American Steel Foundries*, 52 N. L. R. B. 432.

[24] Besides the instant *Atkins* case, see *Matter of American Forge Co.*, 44 N. L. R. B. 826; *Matter of Bethlehem Steel Corp.*, 47 N. L. R. B. 1330.

guards, unlike supervisors, have no power whatever to hire or discharge other employees, or to recommend such action. They have no authority to direct or determine the efficiency, capability or skill of production and maintenance employees. They neither assign work to employees nor pass upon the quality of their performance. They have no subordinates. Their sole duty with reference to other employees is to report instances of acts injurious to plant or personnel such as theft or sabotage (*Jones*, R. 8–10). Their function is in this respect purely reportorial, involving neither the exercise of discretion nor the imposition of punishment. And even the violations which they must report are of a quite flagrant nature, requiring in most instances conduct so clearly wrong as to make it unlikely that the guard would have to make any "close" decisions.

Since, therefore, employers do not vest in plant guards, as they do in foremen and other supervisors, the power to affect the wages, hours, working conditions or tenure of employment of other employees, it has never been held that the fact of the guards' membership or activity in a union would even tend to subvert the will of any production or maintenance employee in regard to the exercise by the latter of his own rights of self-organization. No employee's freedom to join or not join a union is jeopardized. It has been held that employers are not responsible for the conduct

of plant guards in forming, joining or assisting labor organizations among production employees, unless such conduct is shown to have been authorized or ratified by the employer.[25] As was pointed out in *Matter of Dravo Corporation*, 52 N. L. R. B. 322, 326–327, the Board

> has never held that the acts of plant guards are unfair labor practices which can be imputed to an employer in the absence of circumstances indicating that the employer authorized or ratified the conduct in question. In this respect, guards and other plant-protection employees are quite different from foremen or other supervisory personnel.

It cannot be contended, as the Board noted in *Matter of Budd Wheel Company*, 52 N. L. R. B. 666, 669,[26] that:

> management requires the services of plant-protection employees at the conference table; or that management would on the one hand be compelled to bargain with its plant-protection force as employees, and would on the other hand be held responsible under the Act for actions of plant-protection employees in encouraging or dis-

[25] *Fentress Coal & Coke Co.*, 44 N. L. R. B. 1033, 1038–1040; *Matter of Wilson & Co., Inc.*, 63 N. L. R. B. 636, 637, n. 2, 638–639.

[26] See also, e. g., *Matter of Aluminum Company of America*, 50 N. L. R. B. 963, 966; *Matter of Maryland Drydock Company*, 50 N. L. R. B. 363, 369; *Matter of Federal Motor Truck Company*, 50 N. L. R. B. 214, 216–217.

couraging employee organization; or that the position of plant-protection employees in the plant set-up is sufficiently dominant like that of supervisory employees so that their participation in collective bargaining would unduly influence the full freedom of choice of the rank and file employees which the Act guarantees.

1. *The premises of the Act, as applied to the facts of the economic relation between plant guards and employers, requires that plant guards be held to be "employees" within the meaning of the Act.*—There can be no question but that rank and file plant guards, like rank and file maintenance or production employees, are included within the statutory definition of "employee" contained in Section 2 (3) of the Act. That the typical relationship between plant guards and plant management is that of employee and employer is a proposition made plain by what has already been said. See *supra*, pp. 45–53. And certainly, the purposes of the Act, in the light of which the term "employee" must be read (*National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 129), are as applicable to plant guards as to employees who perform other duties. Absent collective bargaining, the plant guard-employer relation is characterized by the same inequality of bargaining power, the same unilateral employer determination of wages, hours, and working conditions, and the

same need for collective action by the guards to secure an effective voice in the determination of their terms and conditions of employment, which characterizes modern employer-employee relations generally. The same provocations to dispute inhere in employer refusals to recognize the right of guards to organize for collective bargaining and to bargain with their freely chosen representatives as inhere in employer refusals to recognize the bargaining rights of employees engaged in other trades or crafts. The dual objectives of the Act, equalization of bargaining power by promoting self-organization, and elimination of strikes which interfere with the free flow of commerce by substituting the duty to bargain collectively for the power to resist collective bargaining which leaves employees no recourse but to strike, are therefore completely obtainable here.

These propositions, indeed, have never been challenged since the earliest days of the Act when the Board first held that plant guards, who had organized for the purposes of collective bargaining, were entitled to the Act's protection. *Matter of Luckenbach Steamship Co.*, 2 N. L. R. B. 181 (August 31, 1936). Employers who oppose the extension of collective bargaining protection to plant guards have never denied that guards can no more deal individually on a basis of equality with their employer concerning their wages, hours,

and working conditions than can those categories of employees who are admittedly covered by the Act.

2. *Statutory protection of the right of plant guards to organize and bargain collectively does not jeopardize the employer's interest in faithful performance by the guards of all legitimate tasks assigned to them.*—From the very beginning, the sole contention of those employers who would deny plant guards the protection of the Act has been that if guards organize and seek to bargain collectively, they become subject to conflicting claims upon their loyalty which will prevent them from properly performing their duties. We have shown in our brief in *Packard Motor Car Co.* v. *National Labor Relations Board,* No. 658, this Term, 1946, pp. 66–87, that the duties of foremen are not inconsistent with their membership in a union and bargaining collectively through it. Everything there said is at least equally true as applied to a plant guard who has neither the continuous nor the close and direct relationship with production and maintenance employees which a foreman has. The duties of a plant guard as shown by the records in these cases do not impose on him any relationship with other employees different from the guards' relationship to non-employees. The guard must report all persons who steal, commit breaches of the peace or otherwise endanger the safety of plant and personnel.

Non-employees or supervisory employees, as well as rank and file employees, must be reported without distinction (Cf *Atkins*, R. 80).

The Board's experience for the past eleven years demonstrates that self-organization and collective bargaining by plant guards do not jeopardize legitimate employer interests in plant protection. Thus in several of the cases which have come before the Board, employers attempted to prove that when plant guards joined a union they became less attentive to duty and were, for example, loathe to report incidents of wrongdoing where fellow unionists were concerned. The allegation was never proved. For example, the employer made this argument in the very first case, in which a union sought to be certified as the representative of a unit including plant guards, *Matter of Luckenbach Steamship Co.*, 2 N. L. R. B. 181, 188–189 (August 31, 1936). But the evidence introduced in support of the allegation disproved rather than proved it. As the Board pointed out "the only specific instance [of alleged inefficiency attributed to a plant guard's union affiliation] testified to was one where a watchman who was a member of the Union had promptly reported to his employer * * * the case of a longshoreman whom he had detected pilfering." 2 N. L. R. B., at 188. The Board thereafter had occasion to observe the effect of collective bargaining by these guards upon the employer's legitimate interests in faith-

ful performance. After the Board's certification of a local of the International Longshoremen's Association as bargaining representative for the plant guards and miscellaneous waterfront workers, a majority of the employers involved in the *Luckenbach* case entered into a contract with the local covering both guards and other miscellaneous waterfront employees. In a subsequent proceeding under Section 10 of the Act, brought against those employers who had refused to honor the certification, the Board noted that although a year had elapsed since execution of the contract between the other employers and the Union, no attempt was made to show that "the operation of that agreement has not been satisfactory." *Matter of American-Hawaiian Steamship Co.*, 10 N. L. R. B. 1355, 1362–1365 (January 21, 1939).

Moreover, in many of the cases which have come before the Board the plant guards had bargained collectively with management through the same union which represented the production employees for several years prior to the Board's decision, and the employers involved did not contend that their union affiliation had impaired their usefulness. See, *e. g. Matter of Curtiss-Wright Corp.*, 33 N. L. R. B. 490, 495–496; *Matter of Houde Engineering Corp.*, 36 N. L. R. B. 587; *Matter of Arkwright Corp.*, 36 N. L. R. B. 687; *Matter of The National Supply Co.*, 57 N. L. R. B. 194, 195.

Between 1936 and 1942, despite the more than a hundred certifications of unions for plant guards issued by the Board during that period (see n. 18, pp. 47–50, *supra*), not a single employer contested a Board order to bargain with representatives of plant guards in the courts, and in only one case (*American-Hawaiian*) did an employer refuse to honor a Board certification of a union as bargaining representative because the unit was composed in whole or part of plant guards.

The Board does not believe that under present conditions in industry and collective bargaining, plant guards normally perform any legitimate duties which will be jeopardized by protecting their right to organize and bargain collectively. It is unfortunately true that all too often in the past employers have used plant guards as industrial spies or strong-arm men in fighting unions.[27] The Board has held that an employer violates Section 8 (1) and (3) of the Act by imposing upon a guard such duties and by discharging him for failure to perform them. Thus the Board has held that an employer may not require a guard to spy upon a union meeting or

[27] These activities have been fully investigated and described by the La Follette Committee. Sen. Rep. No. 6, 76th Cong., 1st Sess., Violations of Free Speech and Rights of Labor, Report: *Private Police Systems*, Pt. 2, p. 11; 84 Cong. Rec. 3397–3398; Horace B. Davis, *Industrial Policing*, Encyclopoedia of the Social Sciences, vol. 12, pp. 193–196; Wilbert E. Moore, *Industrial Relations and the Social Order* (1946), pp. 405–406. See also n. 22, p. 52, *supra*.

report what occurred [28] and that he may not order a guard to prevent union organizers from lawfully distributing union literature on the street in front of the plant." [29] We do not believe that any employer would today openly argue that guards should be denied the protection of the Act because the employer should be able to exact such duties of plant guards.

The situation which employers chiefly urge as presenting conflicting loyalties for plant guards is the instance of a strike. In the *Luckenbach* case the Board pointed out (2 N. L. R. B., at 188–189): "The contention of the employers that the watchmen would in the event of a strike join the strikers is perhaps well-founded, but the inconvenience suffered by the employers in such a case differs only in degree from the inconvenience suffered when any other type of employee goes on strike. In addition, the testimony shows that at the time of a strike of the ship's clerks employed by Luckenbach Steamship Company, Inc., although the watchmen joined in the strike on the instruction of the striking unions, some of the watchmen remained on duty until the docks were cleared and the companies had secured other watchmen." Unions generally are anxious to provide a guard and maintenance force to

[28] *Matter of Budd Wheel Co.*, 49 N. L. R. B. 1350, 1356. Cf. *In re Brewster Aeronautical Corp.*, 15 War Lab. Rep. 239, 244.

[29] *Matter of Zenith Optical Co.*, 53 N. L. R. B. 252, 270–271.

protect the property in the event of a strike so long as no attempt is made to restore production. Indeed, in defining a strike one author mentions this practice as a constituent feature of a strike.[30]

Labor organizations fully recognize the impropriety of making demands upon their members which are in any sense incompatible with the employees' loyal and faithful performance of duties to the employer. Thus collective agreements negotiated between representatives of plant guards and employers illustrate that management's fears that labor organizations will require employees to use their positions to further union interests rather than the interests of the employer are easily dispelled in the terms of the ultimate bargain.

In a number of typical contracts which are reprinted as Appendix B of our brief in the *Packard* case, No. 658, this Term, pp. 123–131, see also, *Jones,* R. 94–95, 101–106, 132–134; *Atkins,* R. 297–304, unions of production workers which represent plant guards agree that the guards must perform their assigned duties "impartially and without regard to any union or non-union affilia-

[30] S. Howard Patterson, *Social Aspects of Industry* (1943), pp. 390–391. Cf. *Matter of Lansing Co.*, 20 N. L. R. B. 434, 444–445; Arthur E. Suffern, *The Coal Miners' Struggle for Industrial Status* (1926), pp. 315–316; Department of Labor, Bureau of Labor Statistics, Bull. No. 686, *Union Agreement Provisions* (1942), pp. 166–167; Bureau of National Affairs, Inc., *Collective Bargaining Negotiations and Contracts*, Part II (1945), pp. 77:1, 77:11, 77:901, 77:902.

tion or activities" (*e. g., Jones,* R. 102, 103, 105, 106). They agree that guards must hold in strict confidence any confidential information which they may acquire (*e. g., Jones,* 102, 104, 106). Finally, such unions undertake that in the event of a strike by production workers, the plant guards shall continue to report for duty, remain at their posts and discharge their assigned duties in the usual manner (*e. g., Jones,* R. 102, 103, 104, 105, 106, 132, 133, 134). This undertaking is particularly significant since the guards agree to refrain from exercising their economic power to compel the employer to comply with wage, hour, or other working condition demands, in deference to the employer's interest in maintaining continuous protection of his property at all times. Such a waiver by the guards of their right to strike is appropriate, of course, only where the guards may feel that their interests in dealing with the employer are adequately protected by a representative of the guards' own choosing. Thus collective bargaining facilitates rather than obstructs accomplishment of the legitimate objectives of plant security.

This is not to say that no union or no employer would ever make an improper demand upon a plant guard. Nor is it to say that no plant guard would ever succumb to such a demand. We do say, however, that experience has shown that normally the respective areas of legitimate union

and employer interests are easily discernible, are quickly agreed upon by unions, employers and plant guards, and are respected by all the parties. Under these circumstances there could be no excuse for a rule of law which presumed that plant guards would act improperly at the instance of either employer or union, thereby reversing the normal presumption of innocence which characterizes our jurisprudence as a whole. As in other fields of the law, the occasional defection must be treated as an individual matter and punished as such.

There have been no indications from any source that a sanction imposed only in instances of actual failure to perform the tasks assigned, has proved inadequate to cope with the dangers employers fear. And this is not surprising. For apart from the influences which in any event would induce a plant guard faithfully to perform the duties entrusted to him, such as the desire to preserve the property upon which his livelihood depends, realization that inattention to duty may cost his job is entirely sufficient to assure that the guard will not succumb to any temptation to view with a distorted eye the obligations he owes to the union.

B. MILITARIZATION DID NOT ALTER THE STATUS OF PLANT GUARDS AS EMPLOYEES OF PRIVATE EMPLOYERS OR REMOVE PLANT GUARDS FROM THE PROTECTION OF THE ACT

1. *Militarization did not remove plant guards from the category of "employees" covered by Section 2 (3) of the Act.*—The plant guard forces

here involved were enrolled as civilian auxiliaries to the military police under regulations issued by the War Department pursuant to the President's Executive Order No. 8972, issued on December 12, 1941 (*Atkins*, R. 105, 344–345, Appendix B, *infra*, pp. 134–160). The controlling regulations in effect at all times material in the instant cases are the basic directive of July 2, 1942 (Appendix B, *infra*, pp. 157–160) together with supplementary regulations issued by the War Department on March 17, 1943 (Appendix B, *infra*, pp. 134–157).[21] These regulations stated the purpose of incorporating plant guard forces as a civilian auxiliary to the military police, defined the obligations which guards, as civilian auxiliaries, would owe to the Government, and detailed the effect of civilian auxiliary status upon the status of plant guards as employees of private companies. As stated in the regulations, the purpose of subjecting plant guards to military control was "to increase the authority, efficiency, and responsibility of guard forces at plants im-

[21] The record in the *Atkins* case contains a version of these regulations issued by the Continuous Security District Office of the War Department located in Cincinnati (*Atkins*, R. 58–60, 105–112). Since this is not complete, we have printed the full regulations as Appendix B to this brief, pp. 134–160, *infra*. In the following summary of the provisions of these regulations we refer first to the page in the Appendix where the full regulation is printed and thereafter to the page of the *Atkins* record where the version issued by the District Office of the War Department is set forth.

portant to the prosecution of the war" (Appendix B, *infra*, pp. 134–135, *Atkins*, R. 105–106).

Responsibility "for providing adequate protection at all times against all hazards" was not assumed by the Government but was expressly imposed upon "plant managements" (Appendix B, *infra*, p. 135, *Atkins*, R. 106). As the record in the *Atkins* case shows (*Atkins*, R. 88–89, 82), employers who desired to obtain government contracts for the production of war materials were required to provide "adequate protection" for the plant where the materials were to be produced, by causing existing plant protection employees to enroll as civilian auxiliaries and, where necessary, by recruiting additional employees who would likewise enroll as civilian auxiliaries to expand its plant protection force (cf. Appendix B, *infra*, pp. 135–137, 140–143, 144–145, 148–152, *Atkins*, R. 105–108). As in the case of other occupations deemed by military authorities to bear an intimate relation to national security, contractors were required to secure the approval of the Secretary of War before hiring an alien as a plant guard (Appendix B, *infra*, p. 137, *Atkins*, R. 107), and military authorities reserved the right to veto the hiring or dismissal of a plant guard, if such action by the contractor would result in impairment of the efficiency of the guard force (Appendix B, *infra*, p. 145, *Atkins*, R. 109). Control over "the performance by the guard forces of its ordinary

protective duties" even after "militarization" was left exclusively in the hands of private plant managements and their own civilian guard chiefs (Appendix B, *infra*, pp. 135, 141, 144, *Atkins*, R. 108–109). Nevertheless, because the Government was "directly interested in the security and protection of the plant and its production as essential to the successful prosecution of the war" (Appendix B, *infra*, p. 141, *Atkins*, R. 108), military plant guard officers were authorized to take appropriate action "through the plant management" (Appendix B, *infra*, p. 135, *Atkins*, R. 106) to correct conditions which might result in "defective or inadequate performance by the plant guard forces of its ordinary protective duties" (*ibid.*).

The function of the guard forces as civilian auxiliaries to the military police was stated as follows: "to provide internal and external protection of the plant against sabotage, espionage, and natural hazards [and] to serve with the Army in providing protection to the plant and its environs in emergency situations" (Appendix B, *infra*, pp. 135–136, *Atkins*, R. 106). To effectuate this purpose, military plant guard officers were authorized to exercise direct control over the guard forces "only in matters relating to military instruction and duties as auxiliary military police" (Appendix B, *infra*, pp. 141, 144, *Atkins*, R. 109), and even with respect to such matters it

was provided that, "except at drill and except in emergency situations" orders of miltary plant guard officers should be issued "through the chain of command established by the plant management" and "only after consultation with and, if possible, concurrence by the plant management" (Appendix B, *infra*, pp. 143, 144, *Atkins*, R. 108–109). The regulations provide that the military training should not exceed one hour per week "except with the approval of the plant management" (Appendix B, *infra*, p. 152, *Atkins*, R. 111).

The status of plant guards as employees of the companies which employ them is specifically recognized and preserved. The agreement with the United States, which plant guards were required to execute upon becoming members of the civilian auxiliary to the military police (*Jones*, R. 7; *Atkins*, R. 54–55, 103–104), as the Board found (*Atkins*, R. 31), unmistakably rests upon and presupposes a private contract of employment between the guard and a civilian employer. Throughout the War Department regulations, guards who are members of the civilian auxiliary are referred to as private employees (Appendix B, *infra*, pp. 136, 137, 144, 145, 146, 147–148, 159, 160, *Atkins*, R. 107, 108, 109, 110). With respect to "employer-employee relationship," the the regulations provide that "militarization of plant guard forces does not change the existing systems of hiring, compensation, and dis-

missal; all remain primarily a matter between the guards and the plant managements [and] guards in the employ of a private employer may, as heretofore, be dismissed by that employer * * *" (Appendix B, *infra,* pp. 144–145, *Atkins,* R. 109). With respect to "control" the regulations make it clear that the plant guards "will continue to function as formerly" and that "control, therefore, will be exercised as heretofore through the plant management except at drill and except in emergency situations" (Appendix B, *infra,* p. 144, *Atkins,* R. 108–109). The regulations further provide that "the plant management continues to be charged with the training of its guard forces in their ordinary protective duties" (Appendix B, *infra,* p. 152, *Atkins,* R. 111). Plant managements were required to supply at their own expense uniforms and distinctive insignia to be worn by the guards for the purpose of identifying them as civilian auxiliaries (Appendix B, *infra,* pp. 148–149, *Atkins,* R. 110) and were also required to furnish the guards with appropriate weapons and to train the guards in their use (Appendix B, *infra,* p. 151, *Atkins,* R. 110–111).

With respect to "employee benefits" the regulations provide that "The status of the employer in respect to the employee benefits for the guard force is not changed. For example, social security, workmen's compensation, and employer's liability provisions remain unaffected. * * *"

(Appendix B, *infra*, p. 147, *Atkins*, R. 110). With respect to "labor relationships" the regulations provide as follows (Appendix B, *infra*, p. 148):

> Auxiliary Military Police are permitted to bargain collectively but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police. In view of recent decisions by the National Labor Relations Board (see *In re Lord Mfg. Co. & United Rubber Workers of America, CIO*, Case No. R–4826, February 1943), the Auxiliary Military Police should be represented in collective bargaining with the management by a bargaining unit other than that composed of the production and maintenance workers, although both bargaining units may be affiliated with the same labor organization.

Because the term "the same labor organization" involved an ambiguity, the War Department issued a clarifying memorandum on July 10, 1943, to the commanding generals of all service commands (*Jones*, R. 100–101). This memorandum states:

> 1. It has been reported to this headquarters that labor officers are interpreting Circular No. 15, this headquarters, 17 March 1943, subject, "Auxiliary Military Police," as prohibiting membership of plant guards enrolled as Auxiliary Military Police in the same trade-union local

as that representing production and maintenance workers.

2. Paragraph 6 (h) (2), Circular No. 15, presents applicable War Department policy on plant guard labor representation.

3. In the event that plant guards enrolled as Auxiliary Military Police desire to be represented in collective bargaining with the management, they should be represented by a bargaining unit other than that representing the production and maintenance workers. However, in such event, *both bargaining units may be affiliated with the same trade-union local,* provided they are, in fact, separate bargaining units. [Italics supplied.]

The regulations further provide that collective bargaining agreements covering plant guards who are civilian auxiliaries should include a clause recognizing that nothing in the collective bargaining relationship should interfere with the duties imposed upon the guards as Auxiliary Military Police (Appendix B, *infra,* pp. 147–148).

To enable the War Department to exercise adequate authority over the performance by plant guards of their obligations to the Government, plant guards were subjected to certain of the articles of war (Appendix B, *infra,* pp. 140–141, 158, *Atkins,* R. 105, 107–108). But because the guards were not "person[s] in military service" and therefore could not be punished by court martial in the same manner as soldiers by "forfeiture of

pay and allowances," appropriate modes of punishment for violation such as "a fine, as distinguished from forfeiture" were recommended in the regulations (Appendix B, *infra,* p. 155).

It was further provided in the regulations that "if a member of the auxiliary military police permanently quits his employment without approval by the plant guard officer" he might be discharged without honor (Appendix B, *infra,* pp. 143, 145–146, *Atkins,* R. 108). Discharge without honor was expressly stated to be an exceptional procedure "applicable to exceptional cases when the guard in fact is no longer in the employ of the company and is not available for dismissal, suspension, or reprimand" (Appendix B, *infra,* p. 145, *Atkins,* R. 108–109). The regulations further stated that "a member of the auxiliary military police employed by a civilian employer" who was thus discharged without honor from the auxiliary could appeal such action to higher military authority (Appendix B, *infra,* p. 146). In all other respects, guards who had been enrolled in the civilian auxiliary remained subject to the civil courts (Appendix B, *infra,* p. 155).

Recognizing that many privately employed plant guards were deputized by local authorities as sheriffs or marshals, the regulations pointed out that "in general there will be no considerable additional advantage" in maintaining such status, but that "there will be individual cases in which it will

be advisable to continue the local or state official capacity" (Appendix B, *infra*, p. 151, *Atkins*, R. 111). Finally, consistent with plant guard status as employees of private employers employed in a particular plant and related to the military forces for only a particular narrow purpose and in a limited capacity, the regulations provide that members of a guard force "may be assigned to duty in an emergency at places other than the premises of the plant normally served" only if "such assignment will contribute to the protection of the guard forces' own plant and its environs or to the protection of its production" (Appendix B, *infra*, p. 136).

Shortly after the militarization program was instituted, the National Labor Relations Board, in cases coming before it, recognized that militarized plant guards constituted a generic employee category, and that the incidents of their employment, and their relation to the military did not vary materially from plant to plant.[32] In cases referred to by the Board in its decisions

[32] A collection of more than 135 of the Board's decisions upholding the collective bargaining rights of plant guards as "employees" within the meaning of the Act, after their militarization, appears in Appendix C to the Board's prior petition for writs of certiorari in these cases, Nos. 1237 and 1238, October Term, 1944, pp. 38–41. See particularly *Matter of Chrysler Corporation*, 44 N. L. R. B. 881; *Matter of Budd Wheel Co.*, 52 N. L. R. B. 666; and *Matter of Dravo Corporation*, 52 N. L. R. B. 322. See also National Labor Relations Board, *Seventh Annual Report* (1943), p. 63; *Eighth Annual Report* (1944), p. 57.

in the *Atkins* case (*Atkins*, R. 7, n. 3, 4, R. 32, n. 1), the Board held that, under the War Department regulations, militarization did not affect the status of plant guards as employees of private employers under the National Labor Relations Act. In the *Dravo Corporation* case (52 N. L. R. B., at p. 327) the Board, in considering "the question whether the militarization of guards alters the character of their employment," declared that "it cannot seriously be contended at this time that guards who are sworn into temporary membership in the armed services lose thereby any of the benefits of the Act." Again, in the *Chrysler Corporation case* (44 N. L. R. B., at p. 885) the Board observed that "the Company contends that, even if their ordinary duties do not bar [the militarized guards] from rights guaranteed under the Act, this military regulation changes their employment status and that they are no longer 'employees' within the meaning of the Act." The Board rejected the employer's contention, finding that "the directive order [of the War Department] specifically preserves the essential employment relationship. The employer's right to discharge for cause remains. Hiring, compensation for services performed, and general working conditions remain matters to be adjusted between the employer and the employees through the usual employment contract."

In its decision in the *Atkins* case, the Board expressly noted that the agreement between plant guards and the Government, as well as the military regulations, rests upon and preserves the relation of employer-employee, between the guard and the private contractor (*Atkins,* R. 31). The Board further pointed out that while under the War Department regulations the contractor "may have surrendered to the military authority many of the attributes of control" normally exercised over plant guards, nevertheless, the private employer "retains a sufficient residual measure of control over the terms and conditions of employment of the guards so that the guards should not be deprived of the rights guaranteed in the Act" (*Atkins,* R. 32).

In *Matter of Armour and Company,* 63 N. L. R. B. 1200, the Board further elaborated the reasoning upon which it rested its conclusion that militarized plant guards remained employees of their private employers. The Board said (63 N. L. R. B. at 1205):

> If the incidents of a particular service relation are such as to permit collective bargaining between those who receive services and those who render them, for changes in the terms and conditions of performing the service, the statutory objectives are capable of achievement and the relation may then be held to be one of employer and employee. *N. L. R. B.* v. *Hearst Publications,* 322 U. S. 111; *N. L. R. B.* v. *R. A.*

> *Blount*, 131 F. (2d) 585 (C. C. A. 8), certiorari denied, 318 U. S. 791. Thus, wherever the wages, or hours, or other conditions under which services are performed are fixed by the recipient of the service, either unilaterally or as a result of bargaining with the workers individually, the statutory objectives are capable of achievement, and unilateral or individual determination of such terms or conditions may appropriately be displaced by collective bargaining.

For this reason, the Board pointed out [63 N. L. R. B. at 1206] that, "the [employer's] claim that militarization has deprived it of full and complete control of all aspects of the employment relationship is, even if true, inadequate to establish its contention that it is no longer the employer of the guards within the meaning of the Act. The [employer] exercises control over many important aspects of the guards' employment and is, consequently, in a position to bargain collectively as to such matters."

The Board found nothing in the record in the *Atkins* case which would warrant distinguishing the militarized guards employed by that company from the militarized guards employed by other companies whose status as private employees for the purposes of the Act had been established in prior cases (*Atkins*, R. 31–32).

In setting aside the Board's determination, the court below substituted for the Board's findings

of fact respecting the employment relationship between respondent Atkins and its guards, findings of fact of its own (*Atkins*, R. 354–364). This, we submit, constituted a misapplication of the rule established by this Court in *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 127–129, 130–131, which entrusts to the Board and not to the courts the primary duty of determining the "underlying economic facts" of particular service relations, and of applying the definition of "employee" to such facts in the light of the statutory objectives.

The court found that the fact that the guards "were paid by respondent", admittedly, "the most important incident common to the employer-employee relationship", was "largely minimized if not entirely obliterated" by the fact that payment of the guards and "in fact their employment", was required by the Government "as a prerequisite to respondent's right to engage in the manufacture of war material" (*Atkins*, R. 354–355). In support of this conclusion, the court relied heavily on the fact that "this guard force was born of the exigencies of war" (*Atkins*, R. 355), and also recited that "no plant guard system had theretofore been in existence at respondent's plant" (*Atkins*, R. 362).

In asserting that respondent Atkins had employed no guard force prior to the time it began to manufacture war materials under government

contracts, the court below apparently overlooked the significance of the fact that when it was engaged in the manufacture of peacetime products, respondent Atkins employed 4 to 6 watchmen (*Atkins*, R. 88), a number which it obviously deemed adequate to provide all the protection that was necessary for its plant and products. To refuse to recognize that these watchmen constituted a peacetime "guard force" is to exalt nomenclature above substance. But, entirely apart from the fact that the record thus shows that the military authorities required respondent Atkins to expand its existing protective force, not to create one *ab initio*, the court below misconceived entirely the effect of this requirement with which respondent Atkins undertook to comply, upon the relation between the company and the guards it hired.

Respondent Atkins, of course, was not required to enter into contracts with the Government in the first place. To obtain such Government contracts respondent Atkins undertook to comply with whatever requirements the Government saw fit to impose respecting the terms and conditions under which the contracts were to be performed. For example, to meet the specifications of the contract, respondent Atkins may have been required to obtain new and different types of machinery, or to employ persons with skills entirely different from those it had previously employed. One of the requirements to which respondent

Atkins automatically became subject upon undertaking its contracts with the government, was that it comply with the provisions of the Walsh-Healey Act, Sec. 1, 49 Stat. 2046, 41 U. S. C. 35, respecting the payment of minimum wages and maintenance of other specified conditions of employment for employees engaged in work on such contracts. The requirement that contractors comply with the directives of military authorities in providing adequate plant security was merely another condition which the Government attached to the issuance of such contracts. The fact that military authorities required respondent to hire additional personnel constitutes no basis for differentiation. The maximum-hour provisions of the Walsh-Healey Act, or the specifications of a particular contract, may well require a contractor to employ more help, or a different type of help, on a particular project than the contractor would voluntarily employ. If the reasoning of the court below were sound, it would follow that all such extra employees whom the contractor hired to comply with the Walsh-Healey Act, or with the specifications of a Government contract, were not employees of the contractor at all. We believe that no one would contend for so extreme a result.

In support of its conclusion that the fact of payment of the guards by respondent Atkins was without significance, the court below indulged the assumption that "respondent was reimbursed by

the government for all costs incurred in the manufacture of war material, including that of compensation paid to the guards," and that respondent Atkins therefore served as a mere conduit for payment of the guards by the Government (*Atkins*, R. 355). The record plainly shows, however, that respondent Atkins was not a cost-plus-a-fixed-fee contractor whose labor costs were borne directly by the government (*Atkins*, R. 332–333, 326–327). It is therefore clear that the court below erred in assuming that the rate of wages respondent Atkins paid the guards had no direct relation to the amount of profit which the company derived from its contracts.

But, most significantly, nowhere in its opinion did the court even advert to the undisputed fact that respondent Atkins determined unilaterally, and without any reference to the military authorities, or the government, how much the guards were to be paid (*Atkins*, R. 54, 93). As we shall point out below (*infra*, pp. 89–93), this fact, standing alone, affords sufficient support for the Board's conclusion that the guards remained "employees" of respondent Atkins within the meaning and for the purposes of the Act.

The court below substituted for the Board's findings that "the guards are interviewed for employment by the respondent and not by the United States of America, and are hired by the respondent; * * * their discharge is ordi-

narily initiated by respondent" (*Atkins*, R. 31; 53–54, 59, 68–72, 81–84, 91–92), the court's own inference that "the authority to hire and discharge was solely the prerogative of the military" (*Atkins*, R. 357). The substitution stems, we submit, from a misreading of the applicable military regulations and of the record.

Thus, as to hiring, the regulations show that guards were normally enrolled as civilian auxiliaries to the military police only after they were employed by the private contractors (Appendix B, *infra*, pp. 136–137, 140, 144–145. And the record in the *Atkins* case itself shows that the only rank and file guard who testified, and the chief guard himself, were hired by, and remained in the employ of the company, from one to three weeks prior to their enrollment in the auxiliary military police (*Atkins*, R. 31; 53–54, 59, 68–72, 82–83). The only control reserved by the military over the hiring of citizens as plant guards was the right to veto the employment of such a guard if it was believed that his employment would impair the efficiency of the guard force (Appendix B, *infra*, p. 145, *Atkins*, R. 109) and to require dismissal of a guard if he refused to become a member of the auxiliary military police (Appendix B, *infra*, p. 143, *Atkins*, R. 108). Since the plant operator selected the guards in the first place, it had absolute power to prevent the employment of any guard, a power much greater

than the veto power reserved by the War Department. Only where it was proposed to employ aliens as guards did the military exercise more than a veto power; in such cases, approval by the Secretary of War was required before aliens could be employed (Appendix B, *infra,* p. 137, *Atkins,* R. 107).

The regulations expressly reserve to plant managements the right to dismiss plant guards, subject to the same limited veto power available to the military in the case of hiring (Appendix B, *infra,* p. 145, *Atkins,* R. 109). In addition, the plant operator could suspend guards from duty without the need of securing War Department approval (*supra,* pp. 25–26). There is not a scintilla of evidence in the record that this right was, contrary to the regulations, denied to respondent Atkins by the military authorities.

The court below, therefore, not only exceeded the bounds of its reviewing authority in substituting for the Board's reasonable inferences as to the employer's powers respecting hiring and discharge, its own inference that the employer's sole power in such matters was that "of making recommendations to the military authorities" (*Atkins,* R. 358) (*National Labor Relations Board* v. *Nevada Consolidated Copper Corp.,* 316 U. S. 105); it erred additionally in drawing inferences for which the record affords no support.

Finally, the court below substituted for the

Board's finding that respondent retained a "sufficient residual measure of control over the terms and conditions of employment of the guards" to satisfy the requirements of the Act (*Atkins*, R. 32), its own inference that "all control was exercised by the Army" (*Atkins*, R. 358) and that respondent Atkins "exercised no control" (R. 360). As appears from the facts set forth in the Statement (*supra*, pp. 27–30), there is no evidence that the plant guards here involved received any orders directly or indirectly from the Military Authorities, except the general guard orders applicable to all guard forces at all plants. The specific orders to the guards by way of assignment of work and the details thereof all came, so far as the record shows, from the chief guard who was a civilian (*Atkins*, R. 62, 78, 81). The only subjects about which the chief guard claimed to have consulted the military were the hiring and discharging of guards (*Atkins*, R. 83–84).

The point which the court below seemingly overlooked was that the chief guard in whom respondent Atkins apparently vested plenary power to control the normal, day-to-day activities of the guard force, was himself a civilian employed by respondent Atkins for the purpose of supervising the guards; respondent Atkins did not, nor, under the regulations, could it, transfer the power and responsibility to exercise such control to the Army. Respondent Atkins obviously cannot deny that it

exercised control over the terms and conditions of employment of the guards on the ground that only its chief guard, not its higher officials, exercised such control. And the record leaves no doubt that the chief guard did, in fact, without notifying or consulting the military authorities, exercise such day-to-day control. Thus, for example, on his own initiative, the chief guard established a system of rotating shifts for the guard force (*Atkins*, R. 78–79). There is not even a suggestion in the record that this action was taken at the request of, or even with the approval of, military authorities, or that in so determining the working hours of the guard force, the chief guard was exercising any power other than that which respondent Atkins had vested in him as supervisor of its guard force. Another illustration of the plenary authority which respondent Atkins vested in the chief guard is the manner in which promotions within the guard force were made. Chief Johnston testified that he had "final authority" to promote rank and file guards to the position of lieutenant, and that in exercising that authority he decided, without consulting anyone, which guard was to be promoted (*Atkins*, R. 82). Johnston further testified that after making this decision he "made [the guard] a lieutenant, myself, in my office, gave him his gold badge and his authority and posted the notice that he was a lieutenant, and then I went to Personnel and advised them that he was the new lieutentant," and that thereafter the newly created

lieutenant "got his increase in pay" (*Atkins*, R. 82).

The foregoing evidence, we submit, establishes beyond doubt, that respondent, through its chief guard, exercised, as the Board found, a substantial measure of control "over the terms and conditions of employment of the guards." But even if it were true, as the court below erroneously assumed (*Atkins*, R. 349–350, 358–360, compare *infra*, pp. 88–90), that the "control" test under the Act turned upon direction of "physical conduct in the performance of the service" (cf. *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 128), the evidence that respondent Atkins unilaterally determined the hours of the guards' employment would suffice to establish that respondent Atkins, not the Government, was the employer of the guards.

On the facts as it found them, the court below concluded that respondent Atkins was not the employer of the guards (*Atkins*, R. 364).[33] But the court did not hold that the guards were employees of the United States of America (*ibid.*), and were for that reason exempted from the cov-

[33] In this connection, the court stated that in the oath of allegiance taken by each plant guard "no mention is made of any allegiance owed to" the employer (*Atkins*, R. 354). But this very oath recites that the guard is "employed" by the plant operator (Appendix B, *infra*, p. 160). That, of course, is a sufficient acknowledgment of the duties to his employer which the guard undertook from the moment he was employed.

erage of the Act by the terms of Section 2 (2).[34] Such a holding was precluded by the statutes of the United States which prohibit the United States from employing these guards under the circumstances existing in this case,[35] as well as by the terms of the War Department regulations which clearly disclose the intention of the War Department that the civilian plant guards, although militarized, shall remain employees of the contractor (*supra,* pp. 64–73). Such civilian guards, under the regulations, expressly remain covered by the Social Security Act (*supra,* p. 69), from which, if they were employees of the United States, they would be exempt. See 42 U. S. C., Sections 409 (b) (6) and 1011 (b) (6). Moreover, the regulations themselves distinguish between the effect of militarization upon those

[34] Section 2 (2) of the Act provides that "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States * * *." Since only employers can engage in unfair labor practices (Section 8), Section 2 (2) of the Act has the effect of excluding employees of the United States from coverage by the Act.

[35] Thus Section 665 of 31 U. S. C. provides in part as follows: "Nor shall any department or any officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in sudden emergency involving the loss of human life or the destruction of property." Section 66 of 5 U. S. C. provides in part that: "No Government official or employee shall receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States * * *."

guards who are "in the employ of a private employer" and those who are "Civil Service employees in the employ of the War Department" (Appendix B, *infra*, p. 145). It has never been suggested that respondent Atkins' guards were in the latter category. Under these circumstances, it is clear that the control exercised by the War Department over the respondent Atkins' relations with its guards could not possibly transform the guards from private employees into employees of the United States.

Nor did the court below hold that the guards were members of the armed services. Such a holding was precluded by the fact that the plant guards were never inducted into the armed forces in accordance with the statutory formulae and never took the oath of enlistment required of soldiers. See, 10 U. S. C. 634; 1581. Moreover, the guards were rendered subject to the Articles of War under Section 2 (d) thereof (10 U. S. C. 1473; *Atkins*, R. 118), which, by definition, applies only to persons who are *not* members of the armed forces. Moreover, the War Department regulations clearly recognize that the militarized plant guard is *not* "a person in military service" (*supra*, p. 71). Compare the statement of the Attorney General, Appendix D, *infra*, pp. 164–165.

The court below found it unnecessary "to determine the technical status which [the civilian plant guards] occupy with the federal govern-

ment" (*Atkins*, R. 364). It concluded that the guards forfeited their status as employees under Section 2 (3) of the National Labor Relation Act because their relationship to the Federal Government was "closely akin to that of a soldier" (*ibid*). In reaching this conclusion the court below failed to apply the applicable standards governing interpretation of the term "employee" which have been established by this Court, and applied instead a standard which this Court has expressly repudiated.

In *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 120–129, this Court made it clear that neither particular nor generalized concepts of the incidents required to establish the existence of an employment relation at common law are controlling upon the question whether an employer-employee relation exists for the purposes of the National Labor Relations Act. The Court pointed out (322 U. S. at 128), that the controversies between employer and employee with which the Act was concerned could not "be limited to disputes over proper 'physical conduct in the performance of the service,'" and that therefore "Where all the conditions of the relation require protection, protection ought to be given" (322 U. S. at 129).

These guiding principles the court below in the *Atkins* case completely ignored. Concentrating exclusively, as respondent Atkins had urged

(*Atkins*, R. 13–14), upon the primary common-law indicia of employment, namely, the locus of the right to hire and discharge and to control the physical conduct of the guards in the performance of their service, the court below concluded that, since *in its view these common-law* employer prerogatives had passed to the military authorities, respondent Atkins could not be held to be the "employer" of the guards. Ignoring completely the admitted facts upon which the Board relied, that respondent Atkins fixed the wages of the guards, determined their hours of work and decided which guards to promote to higher positions on the guard force (*supra*, pp. 26–27), the court concluded that "any field open for bargaining between the Union and respondent is an extremely limited one" (*Atkins*, R. 365), and that enforcement of the Board's order would therefore "be little more than an idle gesture," of no "practical benefit" (*Atkins*, R. 366). This constituted an utterly unwarranted substitution of the court's judgment on whether the policies of the Act could be effectuated by holding the guards to be "employees" for the judgment of the Board which was based upon reasoning thoroughly articulated in its decisions (*supra*, pp. 73–76). The *Hearst* case, 322 U. S. at 130–132.

As long as respondent Atkins was free, to take only one example, to determine for itself the amount of wages to be paid the guards, without

any review by the Government, it was free to bargain about that subject with the guards individually. If respondent Atkins was free to bargain with the guards individually it was equally free to bargain with them collectively. And the inequality of bargaining power between the guards and the respondent in that situation compels the view that, under the premises of the Act, if the guards choose to bargain collectively, respondent, under the law, must honor their choice. The field open for collective bargaining, as we have indicated above, extends to more matters than the determination of wages, although if that issue alone were open it would suffice to warrant extension of the benefits of the Act to the guards, for, as the court below itself conceded, pay "is the most important incident common to the employer-employee relationship" (*Atkins,* R. 354). When to that issue can be added, as here, determination of hours of employment and rules governing promotion, it appears beyond doubt that collective bargaining is "appropriate and adequate" for the "friendly adjustment" of such disputes as may arise between respondent Atkins and its guards over the very matters with which the Act is concerned.

The most that can be said in behalf of respondent Atkins' position is that the range of discretion open to it in controlling the work performance of the guards is subject to greater restraint

than is true with respect to its other employees. Even as to such other employees, however, respondent's discretion is not unlimited, but subject to numerous restraints imposed by labor laws, safety regulations, minimum wage laws, workmen's compensation acts, the Selective Service Act, and numerous others, including the National Labor Relations Act. The fact that the Army might in an emergency assume complete control over the activities of the guard force is a contingency hardly different in kind from that provided for in the Selective Service Act, pursuant to which an employer might find a large portion of his working force inducted into the armed forces.

The Board is not alone in its conclusion that plant guards, when militarized, remain employees of the plant operator. Such guards have been treated as private employees for purposes of the Fair Labor Standards Act (*Walling* v. *Lum*, 7 Wage Hour Rep. 570 (S. D. Miss.), and by the National War Labor Board (*In re Detroit Steel Products Co.*, 6 War Lab. Rep. 495; *In re Brewster Aeronautical Corp.*, 11 War Lab. Rep. 286, 15 War Lab. Rep. 239, 240–243; *In re Great American Industries*, 11 War Lab. Rep. 287; *In re Youngstown Sheet & Tube Co.*, 15 War Lab. Rep. 590, 19 War Lab. Rep. 813; *In re General Motors Corp.*, 18 War Lab. Rep. 541). We are informed that they are also so treated by the Social Security Board.

The courts have held that persons occupying positions analogous to that of militarized plant guards in respect of their obligations to the Government were employees of private employers within the meaning of the Act, and for other purposes as well. Thus in *National Labor Relations Board* v. *Carroll*, 120 F. 2d 457, the Circuit Court of Appeals for the First Circuit considered the status under the Act of drivers employed by an independent contractor who was engaged in hauling mail for the United States. Under his contract with the United States the contractor was required to furnish bond for faithful performance of the requisite services. His power to hire was limited to persons meeting certain specified age and educational standards. Drivers employed by the contractor were required to take an oath prescribed by the Post Office Department and to wear a standardized cap or hat, with badge. Drivers were required to load and unload the mails "under the direction of authorized representatives of the Post Office Department"; their vehicles and services were at all times "under the control of the postmaster", and were to be operated "under such schedules as the postmaster may prescribe." In addition, the postmaster reserved the right to "require the contractor to suspend a driver from duty for inefficiency or other serious delinquency". The court held,

nevertheless, that the contractor had "sole authority to fix * * * hours of work, rates of pay, and other conditions of employment" and was, therefore, the employer of the drivers within the meaning of the Act.* So too, the Circuit Court of Appeals for the Sixth Circuit, in the *Jones & Laughlin* case, upheld the Board's conclusion that militarized plant guards are employees of the plant operator (*Jones*, R. 84).

Under these circumstances we believe it cannot be gainsaid that the Board's conclusion that the militarized guards remained employees of respondent Atkins has "warrant in the record" and "a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131.

2. *Militarization did not require the Board to deny bargaining rights to plant guards or to limit*

* See also *Hust* v. *Moore-McCormack Lines*, No. 625, October Term, 1945; *New Orleans Belize S. S. Co.* v. *United States*, 239 U. S. 202, 206; *Glen Alden Coal Co.* v. *National Labor Relations Board*, 141 F. 2d 47, 50–52 (C. C. A. 3); *National Labor Relations Board* v. *West Kentucky Coal Co.*, 152 F. 2d 198, 199–201 (C. C. A. 6), certiorari denied, No. 1198, October Term, 1945; *Standard Oil Co.* v. *Anderson*, 212 U. S. 215; *Carroll* v. *Social Security Board*, 128 F. 2d 876, 879 (C. C. A. 7); *Fleming* v. *Gregory*, 36 F. Supp. 776 (E. D. La.); *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742, 747 (W. D. Va.); *Thompson* v. *Daugherty*, 40 F. Supp. 279, 282 (D. Md.); *Restatement of the Law of Agency*, Ch. 7, Sec. 227 (b). Cf. *Buckstaff Bath House Co.* v. *McKinley*, 308 U. S. 358, 362.

their freedom of choice of representatives to organizations not representing production and maintenance employees.—During the period between July 2, 1942, when the militarization program went into effect, and March 17, 1943, when the War Department promulgated the regulations respecting collective bargaining (see *supra* p. 65), the Board gave serious consideration, in the cases which came before it, to the question whether militarization constituted an obstacle to collective bargaining by plant guards; whether, in the public interest, limitations should be imposed upon the right of militarized plant guards to bargain collectively through unions representi[illegible] production workers; and whether militarized guards should ever be consolidated in a single unit with production and maintenance workers. The Board concluded that the public interest required, rather than precluded, extension to militarized plant guards of the full benefits of the Act and that representation of plant guards by unions representing production and maintenance workers was in no sense incompatible with the guards' duties to the government. The Board, however, also concluded that because of their special obligations to the government, militarized guards should not be included in units of production and maintenance workers, even though, in certain situations, the inclusion of plant guards in such bargaining

units would, absent militarization, be warranted under its normal determinants for the shaping of units of guards and production workers, such as the functional coherence between the two kinds of work, the history of bargaining, whether on a differentiated or joint basis, and the desires of the organizations involved.[37]

Thus, in *Matter of Chrysler Corp.*, 44 N. L. R. B. 881, 884–885, decided October 7, 1942, the Board placed plant guards in a separate bargaining unit and noted that "The present production of war materials at the Company's plants increases the importance of their work and their responsibilities." The Board then rejected the argument that plant guards should be denied the right to bargain through a union representing production workers in the following language (p. 886):

> Freedom to choose a bargaining agent includes the right to select a representative which has been chosen to represent other employees of the employer in a different bargaining unit. We are mindful of the increased responsibilities placed upon plant-protection employees in wartime, but the practices and procedures of collective bargaining are flexible, and may make full

[37] See Third Annual Report of the National Labor Relations Board (Government Printing Office, 1939), pp. 184–190.

allowance for such added responsibilities.* If, in the instant case, the plant-protection employees select a local affiliated with the International to represent them as bargaining agent, it will be incumbent upon the International to impose a proportionate responsibility upon both organized groups of employees in order that their respective duties may be adequately and impartially performed.

*See also *Matter of Frigidaire Division, General Motors Corporation*, and *United Electrical, Radio & Machine Workers of America, (C. I. O.)*, 39 N. L. R. B. 1108, and cases cited therein [Board footnote].

The *Chrysler* decision was followed in several subsequent cases, including *Matter of Lord Manufacturing Co.*, 47 N. L. R. B. 1032, decided February 25, 1943.

The care with which the Board has treated this problem and its consciousness of the considerations involved are also manifest from its decision in *Matter of Dravo Corp.*, 52 N. L. R. B. 322, 327–328. In the *Dravo* case the Board not only segregated the guards from production workers for bargaining purposes but separated a unit of guards who were militarized from those who were nonmilitarized. It thus indicated the reasons for its decision:

> The militarization of plant-protection employees, while no obstacle to unionization, is nevertheless significant. As civilian

> auxiliaries of a military force, the guards have greater duties and obligations than have those plant-protection employees who are not militarized. To the end that the guards may be better able to function within the military sphere, and to permit the military authorities to exercise greater control over the guards, we shall establish a bargaining unit for all militarized plant-protection employees separate and apart from those who are non-militarized. We contemplate that the separation of the bargaining units in their negotiations with the Company and their day-to-day activities will be one of fact, not merely form.

In the *Armour* case, the Board again rejected an employer's contention that membership by militarized plant guards in a production workers union was incompatible with the duties owed by the guards to the Government. The Board stated that, nothing in the obligations assumed by a guard upon joining a union "would justify a belief that any duality of allegiance is created to the detriment of the duties performed by the guards. Moreover, it is obvious that if any conflict arose between the loyalty owed by the guards to the Government of the United States and their loyalty to the Union, loyalty to the Government would be their paramount obligation. * * * We have refused in the past to hold that membership in a union tends to undermine the honesty of plant-protection employees or their competence to ex-

ecute their duties satisfactorily (*Matter of Draco Corporation,* 52 N. L. R. 322, 327); we now decline to hold that membership in a union tends to undermine their patriotism" (63 N. L. R. B. 1207).

This administrative policy, and the reasons which underlie it, initiated by the Board in order to accommodate collective bargaining to the exigencies of war production, the military authorities approved and adopted. The War Department regulations, under the heading of "Labor Relations," Section 6 *h*(2) (Appendix B, *infra,* p. 148), make it clear that "Auxiliary Military Police are permitted to bargain collectively." They further make it clear that Auxiliary Military Police are permitted to join and to select as their collective bargaining representative the *same trade union* local, which represents the production and maintenance workers in the plant (Jones, R. 100–101). Basing its ruling upon the Board's decision in the *Lord Manufacturing* case (p. 96, *supra*), the War Department expressly provided that militarized plant guards, whether or not they select as their representative the same labor organization which represents the production workers, should be grouped for purposes of collective bargaining in a separate unit, apart from bargaining units composed of other types of employees (Appendix B, *infra,* p. 148). These provisions are clearly founded upon the War Department's concurrence with the Board's view that there is no necessary

inconsistency between the obligations assumed by guards upon joining any union and the guards' obligations to the government.

In its initial opinion in the *Atkins* case, the court below, ignoring the fact that the War Department regulations had been predicated upon reasoning theretofore enunciated by the Board, and that they expressly embodied the rules theretofore applied by the Board, concluded that the regulations constituted an impediment to all self-organization and collective bargaining by militarized guards, and compelled a "postponement of the right to bargain, as contemplated by the Act, until some future time" (*Atkins*, R. 364). Thus the court below asserted that the condition imposed by the regulations, that no concerted activity by the guards would be tolerated which would interfere with their duties to the Army, rendered the War Department's express affirmation of the right to bargain collectively a mere "gratuity", "on a par with that extended to a boy when he is given permission to swim, providing he stays away from the water" (*ibid.*).

Apart from the fact that in reaching this conclusion the court below obviously misconstrued the intent and purpose of the War Department regulations, its assumption that collective bargaining by militarized guards would necessarily interfere with faithful performance of their duties to the military authorities is patently un-

warranted and unsound. Wages can be established, working hours set, seniority rules adopted, and grievance procedures inaugurated, through collective bargaining between the representative selected by the guards and the plant operator, without touching upon, much less interfering with, any obligation the guards owe to the Government.

In its initial opinion in the *Jones & Laughlin* case, the Circuit Court of Appeals for the Sixth Circuit, without indicating what weight, if any, it attached to the applicable provisions of the War Department regulations, determined that militarized plant guards could not, consistent with their duties to the Army, assume obligations to unions composed of production workers, and held that the Board could not lawfully require employers to bargain collectively with a representative freely chosen by such guards, if, as in the *Jones & Laughlin* case, the representative selected by the guards also represented a separate unit composed of production workers. The court below stated its views in the following language (*Jones*, R. 88–89):

> When these particular Unions were selected as bargaining agents for the plant protection employees, these employees might in an effort to discharge their duty to their employer find themselves in conflict with other members of their Union over the enforcement of some rule or regulation they were

> hired to enforce; or upon the other hand, in conflict with the Federal Government because of fealty to the Union at the time of a dispute involving the public interest. We think that the imposition of such strains upon personal allegiance and personal interest would undobutedly be detrimental to the public interest and to the free flow of commerce.

In its original opinion in the *Atkins* case, the Circuit Court of Appeals for the Seventh Circuit went even further. It held that (*Atkins*, R. 366):

> * * * Nothing should be permitted which will interfere in any degree or to any extent with the obligation which these guards have with the military. Membership in a union with the right to bargain might, in fact is likely to, do that very thing. To so state is not to cast any reflection upon the patriotism of the guard members. It is merely a recognition of that which is a matter of common knowledge.

In thus deciding that union membership and collective bargaining by plant guards were incompatible with national security in time of war the courts below substituted their judgment of the effect collective bargaining was likely to have upon the guards' adherence to their obligations to the Government for the considered judgment of the Board and of the War Department. In formulating these judgments the courts below, as their opinions show, relied neither upon past ex-

perience nor upon evidence in the records before them. On the basis of sheer speculation in one case (*Jones*, R. 88–89), and what was termed "common knowledge" in the other (*Atkins*, R. 366), the courts below upset a bargaining pattern which the military authorities, who are charged with ultimate responsibility for the proper functioning of the militarized guards as a wartime protective force, expressly approved, and which the Board, which is charged by Congress with administering the collective bargaining statute in the public interest, had formulated and applied in over a hundred cases (*Jones*, R. 95, 107–111).

In its opinion in the *Jones & Laughlin* case, the Sixth Circuit attempted to justify its disregard of the rule which requires the courts to uphold Board determinations as to how the policies of the Act may best be reconciled with other important public and private interests unless the Board's determinations are arbitrary or capricious (See, e. g., *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, 797–798; *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67, 81 (C. C. A. 3) (*infra*, n. 38, p. 104); *National Labor Relations Board* v. *Air Associates*, 121 F. 2d 586, 592 (C. C. A. 2); *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 816 (C. C. A. 7)), on the ground that the Board in this case, allegedly, had given no consideration to needs of wartime plant

protection and to the interests of the Government. This assumption by the court below simply does not conform to the facts.

As we have demonstrated above, the Board's policy in this field was formulated only after the most careful consideration of the special responsibilities of the guards in wartime and the effect which either denial or protection of their bargaining rights would have upon our wartime economy. The public interest with which the Board was here concerned, that production should not be impeded and commerce burdened by strikes for recognition is even more important in time of war than in time of peace. By insisting that the Board refuse to accord statutory protection to the right of plant guards to bargain through freely chosen representatives, the courts below ignored the effects upon production which Congress, on the basis of its experience, was convinced would follow from such a withholding of remedy (Act, Section 1).

The courts below were of the opinion that the wartime emergency required limitations on the process of collective bargaining. The policy of the government during the wartime period rested on the opposite view. In adopting the War Labor Disputes Act, 57 Stat. 163, 50 U. S. C. App. (Supp. V) 1501, *et seq.*, Congress was careful to provide that all actions of the National War Labor Board under the statute must "conform to the provisions of * * * the National Labor Relations Act." Section 7 (a) (2). The same limitation

was placed upon government agencies which operated facilities under the Act. Section 5. Congress thus recognized that, as the Board has held, "An efficient prosecution of the war effort demands the preservation of the right to collective bargaining, not its destruction." *Budd Wheel* case, *supra*, 52 N. L. R. B., at p. 670.[38]

This is particularly true in the case of militarized plant guards. For during the wartime emergency these employees surrendered their right to strike and to engage in other concerted activities whereby they might protect their interest in securing decent wages, hours and working conditions, and submitted to novel restraints in the interests of the war effort. Under these circumstances, to deny the guards the right to

[38] Cf. *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67, 81 (C. C. A. 3) in which the court stated:

"The second consideration, namely, the serious nature of the production of everything that pertains to war industry is of obvious importance. But the argument of lawyers in a courtroom that the disestablishment of a present bargaining unit and the abrogation of a present contract will disturb that production or will not disturb it is necessarily pure speculation. The Board is charged with the responsibility of representing the public interest, not that of private litigants. This the courts have said over and over again. Neither we nor counsel may assume that the Board is not conscious of all the factors to be taken into consideration in the present emergency nor have we any reason to assume lack of competence on their part to arrange such adjustment as is necessary to preserve the public interest. The problem is peculiarly one for expert administration and that the statute has lodged in the Board, not the courts."

bargain collectively through freely chosen representatives would be to leave them completely at the mercy of their private employers, who, operating for profit, would have unfettered power to impose upon the guards any wages, hours or working conditions they might deem proper. So obviously unfair a result can be avoided only by preserving intact the right of the guards to bargain collectively through any representative they may freely select, including organizations composed of production and maintenance employees. Often indeed, such an organization, which already represents the main body of workers in a plant, is the only one willing to undertake the obligation of representing the plant guards in collective bargaining. Certainly, such an organization is often the best qualified to undertake such representation, both because of prior experience in negotiating with the management and because of its intimate knowledge of wage structures and working conditions in the plant generally. Moreover, simply because of the limitations necessarily imposed upon the right of the guards themselves to exercise economic pressure upon the employer in support of their demands, it is essential that they be permitted to select as their bargaining agent an organization which, because it represents the production workers, has sufficient bargaining power effectively to represent them. To preclude the plant guards from selecting such an

organization to represent them, therefore, relegates the guards to a position of hopeless inequality in dealing with management concerning their own wages, hours and working conditions. Further, by compelling the introduction of a new labor organization into the plant it invites friction between competing unions which could not fail to have ill effects upon industrial peace.

Nowhere in the opinions of the courts below is there any indication that these crucial factors were even considered. Instead the courts below concentrated exclusively upon the alleged danger that militarized plant guards, if union members, might fail to enforce some rule or regulation against fellow members of the union, or might fail to perform their duties to the government in time of a strike (*Jones*, R. 88–89; *Atkins*, R. 366). Neither the Board nor the War Department were oblivious of these dangers. Both concluded, however, as we have shown (*supra*, pp. 93–98), that they could be sufficiently minimized, and indeed entirely avoided, by appropriate measures which did not involve sacrifice of the right of the guards to bargain collectively through freely chosen representatives.

The judgment of the Board and the War Department has been confirmed by experience. The Board has certified bargaining representatives for units of militarized guards in more than 105 cases. In more than 80 of these cases, the

certified union also represented a separate bargaining unit of other employees of the same employer. In a large number of these cases, the employer recognized the certified union and entered into contractual relations with it. See cases listed in Appendix C, pp. 38–41, of the petition for certiorari in Nos. 1237 and 1238, October Term, 1944. Despite the extensive application of this policy, the Board has received no indication from any source that the dangers to the public interest and particularly to the war effort which the courts below thought to inhere in that policy have in fact materialized in any case.

The opinions of the courts below fail to conform to statutory standards in yet another important respect. Thus, in the *Jones & Laughlin* case, the Circuit Court of Appeals for the Sixth Circuit held that under Section 9 (b) of the Act, the Board was required to withhold collective bargaining rights from the plant guards because they had selected as their bargaining agent a labor organization which also represented a separate unit of production workers. This holding was predicated upon the court's expressed conclusion that the statute empowered the Board, acting with a view to the public interest, "to select bargaining agents" for appropriate units of employees (*Jones*, R. 88). The Circuit Court of Appeals for the Seventh Circuit, in its original opinion in the

Atkins case, announced its agreement with this view (*Atkins*, R. 365–366).

The Board is of the opinion that it does not have the power under the Act to substitute for the desires of employees its own views as to who shall represent them for purposes of collective bargaining. As early as June 15, 1942, in *Matter of Phelps Dodge Copper Products Corp.*, 41 N. L. R. B. 973, 976–977, the Board stated:

> * * * if the guards are employees within the meaning of the Act, then obviously it is not * * * for the Board to say that they may not join unions of production workers or designate such unions to represent them for purposes of collective bargaining. The Act guarantees all employees freedom of self-organization, and the designation of bargaining representatives is left to "their own choosing." Production employees may well exercise their right of self-organization by excluding guards from their bargaining unit; and in appropriate circumstances the Board has deemed the differences in function and interest of the two groups sufficient to exclude guards from a unit of production employees. But neither the production employees, nor the employer, nor the Board can deny the right of the guards as employees to bargain in a unit appropriate for them and to designate any representative they choose for the purpose.

This view, which the Board has recently reaffirmed as it affects supervisory employees, see *Matter of Jones & Laughlin Steel Corporation, Vesta Shannopin Coal Division,* 66 N. L. R. B. 386, comports exactly with the language of the statute, with the opinion of this Court in *Hill* v. *Florida,* 325 U. S. 538, 541, and with the opinion of the late Mr. Chief Justice Stone dissenting on other grounds in *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U. S. 146, 171-172. Compare Brief for the National Labor Relations Board in *Packard Motor Car Co.* v. *National Labor Relations Board,* No. 658, this Term, pp. 100–102. In the light of the key importance which the statute attaches to the value of full freedom of choice of representatives by employees, we respectfully submit that the courts below erred in attributing to the Board under the Act a power to limit and veto the employees' choice.

C. *Deputization does not alter the status of plant guards as private employees or deprive plant guards of the right to bargain collectively through labor organizations which also represent the employer's production and maintenance employees.*—In many of the cases involving the collective bargaining rights of plant guards which the Board decided both before and during the war period, the guards involved had been deputized by local or state officials as deputy sheriffs

or special police.[39] The Board has uniformly held in such cases, as, for example in *Matter of Bethlehem-Fairfield Shipyard, Inc.*, 61 N. L. R. B. 901, 906, that the limited police powers of the guards serve only to implement their authority, and do not alter their status as employees of the company involved. As the Circuit Court of Appeals for the Eighth Circuit observed in *Chicago and N. W. Ry. et al* v. *McKenna*, 74 F. 2d 155, 157:

> It is a common practice * * * to appoint private watchmen who are employed exclusively by agencies or individuals to protect property and who are commissioned by local police authorities so that they may have proper authority to effectively function.

That court, like the Board, was unable "to see that this grant of authority to the watchman transforms in any way his relation to the company as an employee." The court concluded:

[39] See e. g. *Matter of Luckenbach Steamship Co.*, 2 N. L. R. B. 181; *Matter of Bendix Products Corp.*, 3 N. L. R. B. 682; *Matter of Willys Overland Motors Inc.*, 9 N. L. R. B. 924; *Matter of American-Hawaiian Steamship Co.*, 10 N. L. R. B. 1355; *Matter of Westinghouse Electric & Mfg. Co.*, 28 N. L. R. B. 799; *Matter of General Motors Corp.*, 39 N. L. R. B. 1108; *Matter of American Brass Co.*, 41 N. L. R. B. 783; *Matter of Westinghouse Airbrake Co.*, 42 N. L. R. B. 525; *Matter of Standard Steel Spring Co.*, 62 N. L. R. B. 660, 662–663; *Matter of Frick Company*, 63 N. L. R. B. 836–841; *Matter of Bethlehem-Fairfield Shipyard, Inc.*, 61 N. L. R. B. 901, 905–906.

> It is true that they are a particular kind of police officer, but it would be strange to be told that such watchmen in the performance of the only duties they are privately employed to perform are purely public officers with no responsibilities for their acts upon their employers.

Those cases cited in the opinion of the court below in the *Jones & Laughlin* case (*Jones*, R. 121–122), which hold that deputized guards are public officers, deal only with the relationship between the guards and persons other than their employer. They do not impugn in any way the theory of the *McKenna* case, *supra*, that deputization does not change the employee's "relation to the company as an employee." Thus, the holding of the New York Court of Appeals in *Dempsey* v. *New York Central and Hudson River R. R. Co.*, 146 N. Y. 290, is that a statutory "railroad policeman" employed by a railroad is entitled to a free pass as part of his compensation as an employee despite a state constitutional provision forbidding the issuance of a "free pass" to any "public officer."

To allow the "common practice" of deputizing watchman to be used as an excuse for evading liability for the acts of the protective force which is necessary to the operation of any plant would, in the words of another court, "destroy, as it ought, respect for government and courts." *Kusnir* v. *Pressed Steel Car Co.*, 201 Fed. 146, 151 (S. D., N. Y.). See cases collected, 55 A. L. R.

1197. Just as an employer may not evade responsibility for the tortious acts of his plant guards merely by inducing public authorities to deputize them so that they may function more effectively to protect his property, so may he not, by this device, destroy his statutory obligation to pay the wages prescribed by the Fair Labor Standards Act.[40] Nor may an employer by this device avoid his duty to bargain collectively with the guards' duly designated representative.

In its opinion following the remand, the court below in the *Jones & Laughlin* case, while conceding that the deputized plant guards there involved remained "employees" under the Act, and were consequently "entitled to bargain collectively" (*Jones,* R. 121), concluded that because of the duties which deputized guards owe to the public, they could not lawfully be permitted to select as their representative a labor organization which represented the employer's production and maintenance employees. Thus the court said (*Jones,* R. 122):

> In case of industrial unrest and strikes on the part of the production employees, the obligations of the plant guards to the municipality and state would be incompatible with their obligations to the Union which, since it represents production employees,

[40] *Walling* v. *New Orleans Private Patrol Service, Inc.*, 57 F. Supp. 143 (E. D. La.); *Walling* v. *Merchants' Police Service, Inc.*, 59 F. Supp. 873 (W. D. Ky.); *Holmes* v. *Industrial Cotton Mills Co., Inc.*, 8 Wage Hour Rep. 1174 (D. S. C.).

> authorizes and directs the strike. As pointed out in our previous opinion, it is the duty of the Board to consider the public interest as a material factor in selecting appropriate units for collective bargaining. *Marshall Field & Co.* v. *National Labor Relations Board,* 135 Fed. (2d) 391, 393 (C. C. A. 7); *National Labor Relations Board* v. *Delaware-New Jersey Ferry Co.,* 128 Fed. (2d) 130, 137 (C. C. A. 3). We adhere to our conclusion that in the order under consideration the Board failed to give adequate consideration to the public welfare. A contrary conclusion would open wide the door to disorderly and criminal acts because of the limitation which the Board's order places on the power of the Government to furnish adequate police protection.

The court below thus imposed upon plant guards who happen to be deputized by local authorities the same disabilities in respect to collective bargaining that it had in its first opinion imposed upon plant guards who were militarized. The reasoning by which the court below arrived at this conclusion is marked not only by the same fallacies which characterize its reasoning in the case of militarized guards (*supra,* pp. 100–108), but by additional fallacies which stem from the court's disregard of the distinction between militarized guards and deputized guards insofar as their relationship to their employer and the public is concerned.

In the first place, absent the requirements of military authorities in wartime, no employer, so far as we are aware, is required by state, federal, or local governments to employ plant guards at all. An employer, *qua* property owner, has a right, as do all other citizens, to share in the police protection which appropriate governmental agencies are able and willing to provide. If an employer wishes to have more protection than would normally be accorded his property by the local authorities, he is free to employ individuals to provide such protection. But in such cases government does not normally assume the responsibility for providing the additional protection,[11] nor does it assume the economic

[11] The one possible exception to this statement which has come to the attention of the Board is the situation which existed under a Florida statute, enacted in 1943 as a war measure (Chapter 21798, Laws of Florida 1943), which authorized county sheriffs to "furnish adequate guard service to vital war industries if requested so to do by such industries, provided such industries reimburse said sheriffs the actual cost of such guard service." In *Matter of Tampa Shipbuilding Company, Incorporated*, 62 N. L. R. B. 954, 67 N. L. R. B. 1359, the company contended that deputized guards furnished by the sheriff under this statute were not employees of the company but were employees of the county. The Attorney General of Florida took the same view in an action which he brought to enjoin the Board from conducting a hearing in that case. See *Florida* v. *Bellman*, 149 F. 2d 890 (C. C. A. 5). Because the statute left in the hands of the company "real control over the terms, conditions of employment, and the activities" of the guards, the Board rejected this view. 62 N. L. R. B., at 957–961.

burden of compensating such employees or directing their performance of duty. The most that government does in such circumstances is to vest in the private employees police powers to enable them to make arrests and enforce the law. If at any time a government is of the opinion that its police forces are inadequate to cope with "disorderly and criminal acts" it is of course free either to augment its regular police forces or to deputize private citizens, whatever their occupations, and no matter by whom employed, to assist in maintaining or restoring order in the community. It is for this reason that the state normally imposes no duty upon private employers to hire plant guards, nor does it impose upon private citizens the duty to accept or remain in such employment. The only obligation to the state which a plant guard assumes upon being deputized is that which any private citizen assumes when he is deputized, *i.e.* to perform his policing duties faithfully under the laws and the Constitution. The public duties of deputized plant guards thus are not created by, nor are they peculiar to, the guards' relations with private employers.

The court below found a threat to faithful performance of public duties by deputized guards to inhere in the membership of such guards in unions composed of production workers. It apparently believed that in case of a strike by the

production workers the plant guards, if union members, would be tempted either to join the strike or to fail to arrest strikers who committed "disorderly or criminal acts." Even if it be assumed, as is by no means clear, that plant guards, when deputized, undertake to refrain from striking against their private employers, it would by no means follow that plant guards should therefore be denied the right to bargain collectively through unions of their own choosing.

We have demonstrated above that even militarized plant guards, who clearly gave up their right to strike, could not be required to sacrifice in addition their rights to collective bargaining (*supra*, pp. 104–107). And the fact that deputies and special policemen assume obligations to the public to apprehend criminals can certainly not be regarded as a reason for denying to such persons the right of free association and collective bargaining. Deputized plant guards, like all other employees, enter into union membership subject to their duties to the public. The danger that such duties to the public may not be faithfully performed is, as it must be, adequately guarded against by the power of the state to punish disloyalty; not by the denial to citizens of their fundamental right of free association.

In the case of deputized guards, as in the case of militarized guards, the court below failed to realize that the employees involved were already serving *two* masters without noticeable detriment

to their duties to the public. The interests of the plant management and the public are as likely to conflict as are those of the employees and the public. The Circuit Court of Appeals for the Seventh Circuit illustrated one such situation in its opinion in the *Atkins* case when it discussed the possibility that a plant guard might find it necessary in the performance of his duties to the government to arrest an official of the company (*Atkins,* R. 359–360). Certainly there is every reason for a private plant guard who is also a public officer to desire to stand well in the eyes of the plant management which has the sole and exclusive power to hire and fire and to fix his wages, hours and working conditions. To arrest the president of the company in pursuance of duties to the government would, to say the least, require a choice between conflicting loyalties. The court below in the *Atkins* case correctly assumed that the guard would act according to his paramount duties to the public. That assumption is equally applicable where the conflict is between the public and the guards' fellow union members.

Indeed, this assumption has experience as well as reason to recommend it. In the *Jones & Laughlin* case the guards were and remained members of the union to which respondent's production workers belong during the period when they were both militarized and deputized (*supra,* pp. 5, 12, 17), and after demilitarization when their only public duties were to the authorities which deputized them.

Neither respondent nor any public authority has made any claim that their performance of duty during this period was in any way unsatisfactory. Since, as we have shown (*supra*, pp. 57–64, 102–107), the alleged conflict of loyalties arises as soon as guards join and assume obligations to the union, and not merely when collective bargaining rights are extended to them, there is no reason to believe that extension of collective bargaining rights will induce the guards to behave less loyally than they have thus far. Quite the contrary is true. For the denial of collective bargaining rights by an employer is likely, as Congress found, to give rise to strikes and industrial disputes, one of the very evils which led the court below to decide as it did. Once an employer is required to recognize and bargain collectively with the representative selected by its guards, that danger is minimized.

In many cases from 1936 to the present time, the Board has upheld the right of deputized plant guards to bargain under the Act through unions which also represent the employer's production and maintenance employees.[42] Indeed,

[42] We are informed that the National Mediation Board has also decided between 20 and 30 cases involving the same question and that its power to certify as representatives of units of deputized guards labor organizations representing other railroad employees has never been challenged. Cf. Seventh Annual Report of the National Mediation Board (1941), p. 8.

that bargaining pattern has been present in almost 90 percent of the cases involving plant guards generally and deputized guards in particular. Where the employer or the union so requests, the Board establishes a separate unit for deputized guards.[43] The Board's numerous certifications in cases involving plant guards have given rise to a large number of collective agreements between unions representing deputized plant guards as well as production workers, and employers. At no time has a showing been made that the operation of such agreements has jeopardized the interests of public authorities. Cf. *Matter of American-Hawaiian Steamship Co.*, 10 N. L. R. B. 1355, 1364–1365.

Sheer speculation concerning what the public interest requires affords no warrant, we submit, for destruction by the courts of rights and privileges which the officials directly charged with the duty of protecting those very public interests do not deem incompatible with the general welfare.

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[43] Matter of *Bendix Products Corp.*, 3 N. L. R. B. 682, 688; *Matter of Westinghouse Electric & Mfg. Co.*, 28 N. L. R. B. 799, 801, 802; *Matter of General Motors Corp.*, 39 N. L. R. B. 1108, 1111–1113; *Matter of American Brass Co.*, 41 N. L. R. B. 783, 784–785; *Matter of Westinghouse Airbrake Co.*, 42 N. L. R. B. 525, 526–527; *Matter of Bethlehem-Fairfield Shipyard, Inc.*, 61 N. L. R. B. 901, 905–906; *Matter of Standard Steel Spring Co.*, 62 N. L. R. B. 660, 662–664; *Matter of Frick Co.*, 63 N. L. R. B. 836, 841.

II

DEMILITARIZATION DOES NOT RENDER MOOT EITHER THE BOARD'S ORDERS IN THESE CASES OR THE QUESTIONS WHETHER MILITARIZED PLANT GUARDS ARE EMPLOYEES WITHIN THE MEANING OF SECTION 2 (3) OR WHETHER THEY ARE ENTITLED TO BARGAIN COLLECTIVELY THROUGH LABOR ORGANIZATIONS REPRESENTING SEPARATE UNITS OF PRODUCTION AND MAINTENANCE WORKERS

In its petition for rehearing filed with the Circuit Court of Appeals for the Sixth Circuit, after that court's original opinion in the *Jones & Laughlin* case, the Board pointed out (*Jones*, R. 93, n. 6) that the guards employed by the respondent Jones & Laughlin had been demilitarized. This statement was appended to the Board's observation that the military authorities had not deemed the additional duties imposed upon plant guards by militarization any reason to deny them the full benefits of the Act. In the Board's petition for a writ of certiorari in that case and in the *Atkins* case, Nos. 1237, 1238, October Term, 1944, the Board pointed out that the guard forces at the Jones & Laughlin plants had been demilitarized on May 29, 1944 and that the guards at the E. C. Atkins plants had been demilitarized on January 6, 1944 and March 7, 1944 (Pet., p. 27, n. 18). The Board asserted at that time that "this change of conditions neither renders the cases moot nor reduces the necessity of a ruling by this Court upon the questions presented" (Pet., p. 27).

This Court granted writs of certiorari, vacated the judgments below, and remanded the cases to the respective circuit courts of appeals "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved and the effect thereof on the Board's orders" (325 U. S. 838).

In the courts below following the remand, the Board maintained the position which it had taken in its petition for writs of certiorari to this Court, that neither the cases nor the questions presented had become moot. The Circuit Court of Appeals for the Seventh Circuit in the *Atkins* case expressly announced its agreement with the Board's position on this issue (*Atkins*, R. 321). It stated that demilitarization was "irrelevant * * * to our decision that the plant guards were not employees of respondent within the meaning of the Act." It reaffirmed its view that the guards, who were militarized at the time of respondent's refusal to bargain, were not then employees within the meaning of Section 2 (3) of the Act. While expressing doubt that the demilitarization of the guards would affect its conclusion that extension to them of the benefits of the Act "would be or is likely to be inimical to the public welfare," the court below, in view of the demilitarization, withdrew this alternative holding from the case (*ibid.*)

The Circuit Court of Appeals for the Sixth Circuit, while agreeing that demilitarization of

the guards did not render the case moot (*Jones*, R. 120–122), did not explicate its views with respect to the effect of demilitarization upon its prior refusal to enforce the Board's order.

The Board's orders rest on holdings that the respondents, by refusing to recognize and bargain with the representatives selected by the militarized guards, violated the Act. These orders are entitled to enforcement only if the Board is correct in these holdings. For unless the employers were legally bound to recognize and bargain with the guards at the time of their refusal to do so (when the guards were militarized), the employers have committed no unfair labor practice and there is nothing upon which the Board's orders can stand. The Board did not find that either of the respondents had engaged in unfair labor practices by refusing to bargain with the guards after demilitarization. It could not have so found because demilitarization did not occur until after the Board's orders were issued. These cases therefore cannot rest solely on the duty of an employer to bargain with the representatives selected by demilitarized guards, but it must also be decided whether an employer has a duty to bargain with the representatives selected by militarized guards.

The Board's order in each of these cases is, of course, a continuing direction to bargain collectively with the representative designated by the plant protection employees, not because of their militarization, but despite it. Each of the re-

spondents' guard forces has continued in existence since demilitarization (*Jones,* R. 114–117; *Atkins,* Stipulation, pp. 9–12, 18–19). It is to be presumed that the representatives selected in the elections continue to be their representatives. Cf. *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U. S. 702; *Matter of Wilson & Co.,* 67 N. L. R. B. 662, 663, 666–670; *Matter of Crucible Steel Co.,* 66 N. L. R. B. 1157, 1159, 1161–1162. Demilitarization, as the courts below both held, cannot make the Board's orders moot. *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332, 334; *Federal Trade Commission* v. *Goodyear Co.,* 304 U. S. 257, 260; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 271.

We submit therefore that the Court of Appeals, for the Sixth Circuit, in its opinion on remand was bound to decide, as did the Seventh Circuit in the *Atkins* case, whether demilitarization altered the view which it had initially taken of the duties of an employer to bargain with plant guards *when militarized* and that, by failing to decide this question, the Circuit Court of Appeals for the Sixth Circuit erred. Nevertheless, in view of the explanation of its initial opinion contained in its opinion on remand (*Jones,* R. 120), and in its opinion in the *Packard* case, No. 658, this Term (R. III, 2106), as well as its holding in this case following the remand, it may be assumed that the court below, had it considered this question, would

have decided that the demilitarization of the guards did not affect its initial conclusion that respondent properly refused to bargain with the representatives selected by its militarized guards. Indeed, the reference in the court's opinion on remand to the plant guards' "obligations to the unions and their fellow workers which might well, in given circumstances, bring them in conflict with their obligation to their employers" (*Jones*, R. 120) indicates that the court below would probably have refused to enforce the Board's order even if the guards had not been militarized at the time of respondent's refusal to bargain. If therefore it be assumed that the right of militarized plant guards, as employees under the Act, to bargain through unions representing production workers was properly before the Sixth Circuit at all (see *infra*, pp. 126–127), the fact of the demilitarization which occurred subsequent to respondent's refusal to bargain and subsequent to the Board's order, could not take this issue out of the case.

III

IN THE *JONES & LAUGHLIN* CASE, NEITHER THE EFFECT OF DEPUTIZATION UPON THE COLLECTIVE BARGAINING RIGHTS OF PLANT GUARDS, NOR THE RIGHT OF PLANT GUARDS TO SELECT AS BARGAINING REPRESENTATIVES LABOR ORGANIZATIONS WHICH ALSO REPRESENT THE EMPLOYER'S PRODUCTION AND MAINTENANCE EMPLOYEES, SHOULD HAVE BEEN CONSIDERED BY THE COURT BELOW

In the *Jones & Laughlin* case the Sixth Circuit Court of Appeals, both in its initial decision, and

in its opinion after the remand, failed to give effect to limitations imposed upon reviewing courts by Section 10 (e) of the Act. Holding inapplicable this Court's statement that the Act "expressly deprives the reviewing court of power to consider" facts not introduced before the Board (*National Labor Relations Board* v. *Newport News Shipbuilding and Dry Dock Co.*, 308 U. S. 241, 249–250), the court below, over the Board's objection, considered the facts relating to the status of the guards as private police officers as though these facts, which had never been presented to the Board, and which appeared only in the stipulation entered into by counsel following the remand, "had been presented at the hearing before the Board" (*Jones,* R. 120). This departure from well-settled principle obviously cannot be justified under the terms of the remand which directed the court to consider only the "alleged changed circumstances with respect to demilitarization." The guards, as the stipulation shows (*Jones,* R. 114–117, see also n. 7, p. 21 *supra*), occupied the same private police status throughout the period of militarization as they did after demilitarization; that status, therefore, could not be considered as a "changed circumstance" attributable to demilitarization. Moreover, the remand, fairly read, appears to authorize inquiry into the "alleged changed circumstances"

only for the purpose of determining whether the Board's order was rendered moot, or, in the alternative, whether an alleged obstacle to enforcement of the Board's order had been removed. We submit that it cannot be read as authorizing decision on the merits of the Board's order on the basis of facts never brought to the attention of the Board.

In more than forty cases the Board has dealt with the question of the collective bargaining rights of plant guards who are deputized by local police authorities.[44] It was clearly improper for the court below to decide this important question in a case where the issues concerning deputization were neither presented to nor considered by the Board.

In both its initial decision and its decision on remand, the Sixth Circuit Court of Appeals also ignored the prohibition of Section 10 (e) that "no objection that has not been urged before the Board * * * shall be considered by the court." Throughout the proceeding before the Board, Jones & Laughlin's sole contention was

[44] The issue of the bargaining rights of deputized plant guards is pending in the circuit courts of appeals. *Wilson & Co.* v. *National Labor Relations Board* (on petition to review 67 N. L. R. B. 662), now pending in the Eighth Circuit, and *Armour & Co.* v. *National Labor Relations Board* (on petition to enforce 63 N. L. R. B. 1200), now pending in the Tenth Circuit.

that plant guards normally, and particularly when militarized, were a part of management and therefore not employees within the meaning of the Act (*Jones*, R. 6–8, 38–40, 56, 57, 68–70). At no time did respondent urge that if the plant guards were held to be employees, they should nevertheless be denied the right to bargain collectively through a union which also represents the employer's production and maintenance employees; yet the court below, of its own motion, declined to enforce the Board's order on this stated ground (*Jones*, R. 87–89, 119–122).[45] This

[45] Respondent's failure in the instant proceeding to object to the Board's order on this ground is to be contrasted with its position in a case involving the plant guards at its Pittsburgh Works, *supra*, pp. 15–16, in which the respondent "moved to dismiss the Petition because the Petitioner is the same labor organization that represents production and maintenance employees in all of its steel plants" (*Jones*, R. 59–60). In the instant case, respondent referred to the pendency of the proceeding involving the Pittsburgh Works for the sole purpose of explaining and buttressing the allegation in its answer to the Board's complaint that respondent's "refusal to bargain is qualified and conditional and not final and conclusive as alleged" (*Jones*, R. 40, 49–50). Respondent took the position that it would finally decide whether or not to bargain with the Steelworkers only after the Pittsburgh case was concluded (*Jones*, R. 47, 48–50, 55–60). At no time did respondent seek to incorporate by reference in this case the objections which it had raised in the Pittsburgh case, nor did it in any other manner urge the Board to disqualify the Steelworkers from representing the guards on the ground that the Steelworkers already represented the production and maintenance employees. Since the

action of the court below appears to be inconsistent with the applicable decisions of this Court. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 326 U. S. 706; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253. The important question respecting the power of the Board, under Section 9 (b), to restrict the freedom of choice of representatives of employees in an appropriate unit should not have been decided in a case where, because the issue was not raised, the Board neither considered the question nor explicated its view of the powers conferred upon it by the Act. Nor was it proper for the court below, having held that the plant guards were employees of respondent, to impose a limitation upon their choice of representatives for which respondent did not contend.

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issue was not raised, the Board's decision in the unfair labor practice case makes no mention of the point, and the only reference to it in the representation case decision (*Jones*, R. 52–55) does not discuss the power of the Board to limit the range of choice of bargaining representatives open to employees in an appropriate unit, or the considerations of public importance which support the Board's general policy of refusing to restrict plant guards' choice of representatives to unions other than those already representing other units of employees of the particular employer. Cf. *Matter of Phelps Dodge Copper Products Corp.*, 41 N. L. R. B. 973, 976–977.

CONCLUSION

The judgments of the courts below should be reversed and the causes remanded with directions to enforce the Board's orders in full.

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FEBRUARY 1947.

APPENDIX A

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C. 151, *et seq.*) are as follows:

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or

other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and

who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

* * * * *

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

APPENDIX B

War Department Regulations providing for the organization of a civilian auxiliary to the military police units:

WAR DEPARTMENT

HEADQUARTERS, ARMY-SERVICE FORCES
WASHINGTON

CIRCULAR No. 15 MARCH 17, 1943

AUXILIARY MILITARY POLICE

Circular No. 52, Headquarters, Services of Supply, August 28, 1942, subject, "The Military Organization of Plant Guard Forces," is rescinded, and the following substituted therefor:

1. *Purpose of military organization.*—*a.* Executive Order No. 8972, December 12, 1941, authorizes the Secretary of War (and the Secretary of the Navy) "to establish and maintain military guards and patrols, and to take other appropriate measures, to protect from injury and destruction certain strategic premises, materials, and utilities." Accordingly, the Secretary of War directed the military organization of plant guard forces as Auxiliary Military Police (see attached letter, The Adjutant General's Office, AG 231.43 (7-2-42) MS-SPAAM-M, July 2, 1942, subject, "Military Organization of Plant Guard Forces.") The purpose is to increase the authority, efficiency, and responsibility of guard forces at plants important to the

prosecution of the war, and through military training to provide auxiliary forces throughout the United States to supplement the Army in wartime emergency situations.

b. Nothing in this circular will be construed as modifying the responsibility of plant managements "for providing adequate protection at all times against all hazards," (par. 4, Memorandum No. S380–4–43, Office of The Adjutant General, Feb. 18, 1943, subject, "Responsibilities for Internal Security.") The plant guard officer (see par. 4*d*) may, however, take appropriate action through the plant management to correct any condition deemed by him to result in or threaten defective or inadequate performance by the guard forces of its ordinary protective duties.

c. The term "plants" as used in this circular includes civilian plants and installations important to the prosecution of the war; War Department plants, posts, camps, and stations; civilian or municipal plants and facilities essential to power, communication, and transportation; other facilities and installations deemed important to the prosecution of the war.

d. The phrase "plants assigned for protective survey and inspection" used in paragraph 1, attached letter, refers to plants and facilities on the Master or Service Command Responsibility List. Before the guard forces at any civilian or municipal plants are militarized, the plant must appear on the Master or Service Command Responsibility List.

2. *Mission of the Auxiliary Military Police.—a.* The mission of a guard force of Auxiliary Military Police is—

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(1) To provide internal and external protection of the plant against sabotage, espionage, and natural hazards.

(2) To serve with the Army in providing protection to the plant and its environs in emergency situations.

b. An emergency situation in which the Auxiliary Military Police may be called upon for military service may arise from flood, conflagration, or other disaster; internal disorders hazardous to property or production important to the prosecution of the war; enemy action by air raid; fifth column activity; paratroop attack or invasion; or it may arise from any other condition or circumstance involving the plant or its community making it necessary to place in operation one or more of the emergency plans of the War Department or of the service command.

c. A guard force or any member thereof, whether on or off duty, may be assigned to duty in an emergency at places other than the premises of the plant normally served, provided only that in the opinion of the plant guard officer or other representative of the Army in command such assignment will contribute to the protection of the guard force's own plant and its environs or to the protection of its production.

3. *Persons eligible for membership in Auxiliary Military Police.—a.* The plant guard officer will determine in each case which groups of employees, in addition to the regular plant guard force, may become members of the Auxiliary Military Police. Persons such as firemen, watchmen, and women guards may be included provided they are able physically to perform the mission and duties of the Auxiliary Military

Police described herein and in the agreement signed by the Guards. Women guards may be armed, but in view of the congressional policy that women's auxiliary forces be limited to noncombatant duty, it is directed that in formulating plans for any emergency situation requiring the use of force against the enemy, such plans will provide for the assignment of any women members of the Auxiliary Military Police to noncombatant activities.

b. No minimum number of guards is required for the militarization of any guard force. Guard forces, no matter how small, will be militarized if the plants which they guard are so located that the guards can be organized, trained, and commanded efficiently by available Army personnel, and if, in the opinion of the plant guard officer, the results obtainable are commensurate with the effort involved.

c. Employment of an alien as a plant guard must be approved by the Secretary of War in the same manner as employment of an alien having access to work on classified or aeronautical contracts.

4. *Responsibility for military organization, training, and command of the Auxiliary Military Police.—a. The Provost Marshal General.*—The Provost Marshal is charged with the general supervision of activities relating to the Auxiliary Military Police as a part of the internal security program. Requests for legal opinions relating to the Auxiliary Military Police will be made through military channels to the Provost Marshal General.

b. Commanding generals of service commands.

(1) The commanding generals of service commands are responsible for the military

organization, training, and command of the guard forces at all plants and installations within their respective service commands except plants and installations which are under the continuing protection responsibility of the Navy, ports of embarkation, and plants and installations which in the opinion of the Provost Marshal General should be exempt from such organization.

(2) At ports of embarkation, the local commanding officer is responsible for the military organization, training, and command of the guard forces. The commanding general of the service command will be advised, if he so requests, of the number, location, equipment, and state of training of such guard forces, and he may make recommendations in connection therewith. The commanding general of the service command may inspect these guard forces at times convenient to the local commanding officer.

c. Commanding officer having jurisdiction over the guard forces. (See par. 3, attached letter.)

(1) *Plants and installations having no local resident commanding officer.*—The commanding general of the service command will designate an officer to be the commanding officer having jurisdiction over the guard forces of plants and installations at which there is no local resident commanding officer. This officer will be the commanding officer of the district of the service command in which the plant or installation is located, unless the commanding general of the service command directs otherwise.

(2) *Plants and installations with a local resident commanding officer.*—The commanding officer having jurisdiction over the guard forces of plants and installations (in-

cluding ports of embarkation) at which there is a resident local commanding officer will be such commanding officer.

(3) In all matters pertaining to military organization, training, and command of the Auxiliary Military Police, the commanding officer having jurisdiction over the guard forces (except such officer at ports of embarkation) will report to the commanding general of the service command.

d. Plant guard officers.

(1) For each plant or group of plants at which there is no local resident commanding officer, the commanding generals of service commands will appoint or cause to be appointed a commissioned officer called the "plant guard officer" to have command (see par. 6*a* (1)) of the guard force.

(2) At each plant where there is a local resident commanding officer, this officer will either serve as plant guard officer himself; appoint an officer from his command so to serve; or request the commanding general of the service command to appoint or cause to be appointed a plant guard officer.

(3) The plant guard officer is the member of the Army of the United States in command (see par. 3*c*, attached letter) of the guard force, and will report direct to the commanding officer having jurisdiction over the guard force (see *c*, above) on all matters pertaining to the military organization, training, and command of the Auxiliary Military Police. Noncommissioned officers from the Army of the United States will be assigned when available to the plant guard officers for the purpose of assisting in military drill and instruction.

e. Termination or change of continuing protection responsibility.

(1) If a plant at which the guard force has been organized as Auxiliary Military Police is removed from the Master or Service Command Responsibility List, the commanding general of the service command will determine whether such guard force will be continued as Auxiliary Military Police, and trained and commanded as before, or whether its status as such will be terminated. In the latter event, each member in good standing of such force will be issued a Certificate of Meritorious Conduct (see par. 6*c*).

(2) Should the responsibility for the continuing protection of any plant at which the guard force has been organized as Auxiliary Military Police be transferred from the Army to the Navy, each member in good standing of the force will be issued a Certificate of Meritorious Conduct prior to the actual assumption by the Navy of the responsibility for continuing protection.

5. *Activation of organization of Auxiliary Military Police.—a. Articles of War explained.*

(1) Guard forces which have not been organized as required (see par. 1, attached letter) will be assembled at the earliest practicable date by the plant management at the request of the plant guard officer. At this assembly the Articles of War as prescribed by Article of War 110 will be read and explained to each member of the guard force (par. 3*a*, attached letter) by the plant guard officer or in his absence or unavailability by some other competent person who is an officer of the Army or civilian officer of the Auxiliary Military Police. As certain of the Articles of War

are generally inapplicable to Auxiliary Military Police, the foregoing directive will be considered complied with if Articles 2, 58, 59, 61–64, 66, 68–74, 76, 81–83, 85, 88–90, 92–94, 96, 104, and 105 are read and explained. These Articles define certain offenses punishable by court martial of which persons subject to military law may be guilty.

(2) The Auxiliary Military Police, immediately after the Articles of War have been read and explained, will be impressed with the fact that the Government of the United States is directly interested in the security and protection of the plant and its production as essential to the successful prosecution of the war. To this end the plant guard officer will issue and post a guard order reading, with appropriate variations to meet local conditions, substantially as follows:

Guard Order No.____

To the Auxiliary Military Police at_____

1. On (date) the guard forces at this plant were activated by the War Department as Auxiliary Military Police, and for military purposes will be commanded, drilled, and instructed as military units.

2. All members of the guard force are subject to the Articles of War and may be Court martialed or otherwise punished for violations thereof.

3. Effective on this date _____, a commissioned officer of the Army of the United States has been placed in command. Although in command at all times, this officer has not superseded the civilian guard officers and normally will exercise direct control only in matters relating to military instruction and duties as Auxiliary Military Police.

4. The mission of this guard force is to provide protection for this plant. In addition to its normal functions the force or any member thereof whether on or off duty is available for military use in any emergency, whether it be the result of flood, conflagration, or other disaster; internal disorders hazardous to the plant property or its production; or enemy action of any nature. *No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission.*

5. The Government of the United States regards the protection of this plant and its production as essential in the successful prosecution of the war. The Auxiliary Military Police are ordered to provide this necessary protection and to ward off danger or threat of danger of any kind and from any source. If force must be used to accomplish this result, it will be used only to the extent reasonably necessary.

6. No member of the Auxiliary Military Police may resign without the written approval of the plant guard officer. Inattention to duty, failure to attend required drill, and conduct unbecoming to the service may be cause of dismissal and the denial of a Certificate of Meritorious Conduct.

For the Commanding Officer, _____ District:

_____
(Date)

_____
(Plant guard officer)

The foregoing guard order will be issued in accordance with the provisions of *c* below.

b. Pledge and agreement.

(1) At the time of reading the Articles of War, each member of the guard force will

give the pledge of loyalty to the United States and execute the agreement, prescribed form of which is shown in the inclosure to the attached letter. A separate pledge or oath is not required. If a guard refuses to sign the agreement, he may (but need not) be temporarily retained with the understanding that he will be dismissed as soon as replaced, and in any event within a reasonable time. The signed agreement will be retained by the plant guard officer. The guard force will be considered as a civilian auxiliary to the Military Police when 75 percent of the guards at a given plant have signed the agreement. (See par. 3, attached letter.) A certificate of membership in the Auxiliary Military Police will be issued each member. Forms will be supplied to the commanding generals of service commands by the Provost Marshal General.

(2) Each plant guard who becomes a member of the Auxiliary Military Police continues as such until he is released from his obligations. This will take place when competent military authority has approved of his dismissal or resignation (see par. 6*b*.) or when he has been discharged without honor (see par. 6*c*).

c. Auxiliary Military Police orders and regulations.

(1) Orders and regulations for the Auxiliary Military Police from the military authority will be issued in the name of the commanding officer having jurisdiction over the guard forces. (See par. 4*c*.)

(2) At civilian-operated plants, such orders will be issued only after consultation with and, if possible, concurrence by the plant management.

6. *Status of Auxiliary Military Police.—a. Control.*

(1) The Auxiliary Military Police will continue to function as formerly, except that a member of the Army of the United States will be in command at all times, and except that they will be trained and instructed with a view to supplementing the Army in affording protection in emergency situations (see par. 2*b*). Control, therefore, will be exercised as heretofore through the plant management except at drill and except in emergency situations. Although the plant guard officers will be in command at all times, *they will not supplant the civilian guard officers,* and unless expediency demands otherwise will exercise their authority through the chain of command established by the plant management.

(2) The Auxiliary Military Police are supplementing the Army of the United States in a vital task of protecting war material and war production facilities. Attempts to intimidate them or to reduce or nullify their efficiency, or interfere with the performance of their mission, may constitute a violation of Federal as well as state criminal laws. When such incidents are suspected, an inquiry will be made and a detailed report will be sent immediately through channels to the office of the Provost Marshal General as a basis for requesting an investigation or prosecution.

b. Employer-employee relationship.

(1) Basically, the militarization of plant guard forces does not change the existing systems of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant man-

agements. Guards in the employ of a private employer may, as heretofore, be dismissed by that employer, and those who are Civil Service employees in the employ of the War Department may be dismissed by the local commanding officer in accordance with Civil Service regulations. In neither case is a court martial necessary.

(2) A member of the Auxiliary Military Police may not be employed or dismissed and may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant's guard force would be impaired and declines to give his approval thereto.

c. Certificate of Meritorious Conduct.—A Certificate of Meritorious Conduct will be issued to each member of the Auxiliary Military Police whose service is terminated honorably. Forms will be supplied to the commanding generals of service commands by the Provost Marshal General. In the event of termination of service under conditions other than honorable, no such certificate will be issued. The commanding general of the service command may authorize a communication to each member of the Auxiliary Military Police whose service is terminated under conditions other than honorable, which will state only the fact of termination, the date, and that the communication is not a Certificate of Meritorious Conduct.

d. Discharge without honor.—If a member of the Auxiliary Military Police permanently quits his employment without approval of the plant guard officer or other duly authorized officer, a notice substantially as follows may be transmitted to him and a copy posted on the plant bulletin board:

SUBJECT: Discharge without honor.
To:

This is to notify you that you are discharged without honor as a member of the Auxiliary Military Police. A copy of this discharge and full statement of facts concerning your absence from duty without leave are being furnished the Provost Marshal General and the Selective Service System, Washington, D. C., for such further action as may be deemed appropriate.

By command of (Commanding General, _____ service command)

Discharge without honor will be regarded as exceptional procedure applicable to exceptional cases when the guard in fact is no longer in the employ of the company and is not available for dismissal, suspension, or reprimand. It should be used only after careful investigation of the facts, which may include a hearing if deemed advisable.

e. Appeal from dismissal.—A member of the Auxiliary Military Police employed by a civilian employer, discharged without honor or dismissed by or at the request of the plant guard officer or other authorized War Department representative (except by court martial proceedings), may, within 30 days of such discharge or dismissal, appeal through channels to the next superior Army authority in writing to reconsider such action. Such appeal will include a brief signed statement of the reasons for regarding the action unjust. If a member of the Auxiliary Military Police is discharged without honor or dismissed for an offense constituting a violation of the Articles of War, he may ask for a trial by court martial.

f. Employee benefits.—The status of the employer in respect to the employee benefits for the guard force is not changed. For example, social security, workmen's compensation, and employer's liability provisions remain unaffected. Employers should have a clear understanding with their insurance companies concerned.

g. Contractual relations.—It is not anticipated that the organization of plant guards as Auxiliary Military Police necessitates changes in existing contracts with the Government, but in any exceptional case where such alterations are essential to carry out the organization, arrangements to effect the necessary changes will be initiated by the plant guard officer with the least delay possible.

h. Labor relationships.

(1) If any proposed labor agreement is being considered which involves plant protection employees who are or may become members of the Auxiliary Military Police, the contracting parties will be urged to insert in such agreement a provision substantially as follows:

"It is understood that for the duration of the war this agreement is in all respects subject to the provisions of the directives of the War Department concerning military organization of the plant guard forces (letter, The Adjutant General's Office, AG 231.43 (7-2-42) MS-SPAAM-M, July 2, 1942, subject, "Military Organization of Plant Guard Forces"; and Circular No. 15, Headquarters, Army Service Forces, March 17, 1943, subject, "Auxiliary Military police;" and any amendments thereto), and that nothing contained in this agreement will be construed in any way to interfere

with the organization, efficiency, training, and control by the War Department of the company guard force as an Auxiliary to the Military Police, nor to abrogate or interfere with the duties, responsibilities, and rights imposed by the War Deparment upon any employee in such Auxiliary Military Police."

(2) Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police. In view of recent decisions by the National Labor Relations Board (see In re Ford Mfg. Co. & United Rubber Workers of America, CIO, Case No. R–4826, February 1943), the Auxiliary Military Police should be represented in collective bargaining with the management by a bargaining unit other than that composed of the production and maintenance workers, although both bargaining units may be affiliated with the same labor organization. Where the guards are not now included in the same bargaining unit, this is mandatory; where the guards are included in such unit, serious consideration will be given to effect a change to conform to the foregoing policies.

7. *Qualifications and equipment of Auxiliary Military Police.—a. Physical fitness.*—A member of the Auxiliary Military Police must be physically fit to perform his duties properly and in an efficient manner. It is sufficient if his physical fitness satisfies the plant guard officer.

b. Uniform.—Each member will be properly uniformed by the plant. A complete uniform consisting of blouse or shirt, trousers, and hat is not required although

the complete uniform is preferred. The plant guard officer will determine, with due regard to all circumstances, whether his guard force is "properly uniformed."

c. Distinctive insignia.

(1). Because the mission of the Auxiliary Military Police includes service with the Army (see par. 2*b*), the laws of war require that members wear distinctive insignia or marks capable of recognition at a distance. By wearing such insignia or marks members serving with the Army will be recognized as legitimate troops and not deemed irregulars or guerillas. Accordingly, members of the Auxiliary Military Police will wear either—

(*a*) An arm band (brassard), white, with the words "Auxiliary Military Police" in blue, such as has been distributed to commanding generals of service commands for issuance; or

(*b*) A badge or patch which may be worn on the right or left sleeve, at the shoulder or cuff level, or on the right or left breast pocket, either of a design substantially similar to the drawing attached to the letter, Office of the Provost Marshal General, SPMGS 231.4, November 28, 1942, subject, "Distinctive Insignia for Auxiliary Military Police," or of any other design, capable of recognition at a distance, bearing the words "Auxiliary Military Police," and approved by the commanding general of the service command.

Commanding generals of service commands will determine the device that will be worn by a given guard force and the manner and time of wearing it. Badges or patches must be procured by the plants

adopting them, at their own expense, and may be manufactured of any noncritical material. Commanding generals of service commands may also authorize plants to procure at their own expense arm bands, similar in appearance to those already issued, of any color combination capable of recognition at a distance and manufactured of any noncritical material.

(2) Each member of the Auxiliary Military Police is authorized to wear a service stripe for each six months of service faithfully performed. Service stripes will be in accordance with Army Regulations (see par. 27*c*, AR 600–35, Nov. 10, 1941, "Personnel—Prescribed Service Uniform"; par. 46*e*, AR 600–40, Aug. 28, 1941, "Personnel—Wearing of the Service Uniform"), except that they will conform in material and color to the chevrons furnished by the plant management to noncommissioned officers of the guard force.

(3) Commanding generals of service commands may authorize a guidon for an Auxiliary Military Police force which has shown itself outstanding in training, appearance, and efficiency.

d. Identification cards.—Each member of the Auxiliary Military Police must carry at all times an identification card bearing his photograph, fingerprints, signature, and description properly authenticated by the plant guard officer. As no special form of card is required, existing cards which can be made to satisfy all of these requirements may be utilized. The description of the guard need not be in detail, and will be sufficient if it contains easily recognizable characteristics such as color of hair and eyes, height, weight, and age.

e. Arms.

(1) The Auxiliary Military Police must be armed with appropriate weapons furnished by the plant management if such arming is recommended by the plant guard officer. Any sidearm, rifle, or shotgun may be an appropriate weapon depending on the circumstances. Training in the use of firearms and providing ammunition therefor are functions of the plant management. If the plant guard officer determines that the Auxiliary Military Police are not sufficiently trained in the use of firearms or are not adequately qualified in marksmanship, he may require the plant management to give further training and when he deems it desirable may accomplish such training himself.

(2) The Auxiliary Military Police, as agents of the Federal Government, will not be subject to any state or municipal requirement which conflicts with their wartime duties. A member of the Auxiliary Military Police required to be armed in performance of his duties will not be compelled to obtain a license, permit, or bond to possess small firearms in order to comply with local statutes or ordinances. State authorities have concurred when this question has been presented. The full cooperation of state and local authorities will be obtained and local requirements met unless a satisfactory understanding is reached.

f. Deputizing.—In general, there will be no considerable additional advantage in deputizing members of the Auxiliary Military Police as sheriffs or marshals. However, there will be individual cases in which it will be advisable to continue the local or state official capacity. The authority of the

plant guard includes power to arrest without a warrant for violation of the Sabotage Act (50, U. S. C., 101–106) or the Espionage Act (50, U. S. C., 21 and 32).

g. Training.

(1) The plant management continues to be charged with the training of its guard forces in their ordinary protective duties. In addition, the guard force must be qualified to perform its mission as set forth in paragraph 2*a*. This includes the ability to serve efficiently with the Army in any emergency situation that may arise (see par. 2*b*). To this end, the Auxiliary Military Police will be trained by or under the direction of the plant guard officer in military subjects to the extent he deems necessary. The use of experienced personnel from within the guard force for the purpose of conducting such training will be encouraged by the plant guard officer. The time to be devoted to such training will be determined by the plant guard officer. It will not exceed one hour per week or its equivalent except with the approval of the plant management.

(2) The military training will consist of such of the subjects listed in (3) and (4) below as the plant guard officer finds appropriate for each guard force, giving due consideration in each instance to the character, experience, previous training, and qualifications of the force as well as the locality and geography of the plant, its importance in the prosecution of the War, and all other pertinent considerations.

(3) Basic military subjects in which training may be given include—

(*a*) Military courtesy and discipline; Articles of War.

(*b*) Defense against air and parachute attack.

(*c*) Interior and special guard duty (military only).

(*d*) Personal encounters.

(*e*) Inspections.

(*f*) Use of weapons—hand grenades, pistol, police riot club, shotgun, tommy gun (where applicable).

(*g*) Military police—organization, duties, powers of arrest, use of force, etc.

(4) Advanced subjects in which training may be given include—

(*a*) Riot formations.

(*b*) Approach marches.

(*c*) Other applicable subjects included in military police tactical unit training.

(*d*) Tactical problems which may be given from time to time to determine the effectiveness of the guard force in emergency situations.

(5) Judgment, initiative, imagination, and a cooperative relationship with the plant management are essential in determining the kind and amount of training to be given. Not only will the training requirements vary in different plants, but the requirements within a given guard force, may vary. Guards will not be required to attend drill or instruction covering subjects in which they are already trained and qualified. Training films, film strips, and film bulletins are regarded as valuable in the military training of Auxiliary Military Police, and the plant guard officer will encourage their use. The necessary projecting equipment, in which there may be a shortage, may often be borrowed from local clubs and similar organizations. The objective of all training is to increase the

efficiency of the Auxiliary Military Police, and unless this is accomplished the plant guard officer has failed in his mission.

8. *Subjection of auxiliary Military Police to military law.—a. Court martial jurisdiction.*

(1) The commanding generals of service commands have general court martial jurisdiction over the plant guard forces within the geographical limits of their commands. The commanding officer of any War Department owned and operated plant and the commanding officer having jurisdiction over the guard forces (see par. 4*c*) have the power to appoint special and summary courts martial, subject to the right of superior authority to appoint such courts when deemed desirable. The commanding officer having jurisdiction over the plant guard forces may also appoint summary courts martial, subject to the right of superior authority to appoint such courts; except that when the plant guard officer is the only commissioned officer present with a plant guard command, he will be the summary court martial of that command and will hear and determine cases brought before him.

(2) The plant guard officer also has the summary disciplinary authority of a company commander pursuant to Article of War 104. Attention is directed to the fact that an offender may not be summarily punished if he demands trial by court martial and also that if, after consenting to receive summary punishment, he deems his punishment too severe he may appeal to the next superior authority for review. Court martial jurisdiction exists at all times, even while the Auxiliary Military Police are off

duty. However, it is inadvisable to order a court martial for offenses committed while off duty and not within the plant premises, unless the offense is directly connected with the individual's duties as a member of the Auxiliary Military Police.

(3) Pending instructions to the contrary, no court-martial proceeding of any nature involving a member of the Auxiliary Military Police will be commenced without the prior approval of the War Department.

b. Discipline.—The institution of a court-martial proceeding will be resorted to only in cases where no other form of punishment will be effective. If the offense involves a violation of a criminal statute or ordinance other than the Articles of War, the individual will be turned over to the civil law enforcement officials.

c. Confinement.—In the absence of an adequate guardhouse or place of confinement, offenders will be confined at the nearest military post having a guardhouse, or turned over to the United States marshal for custody. United States marshals usually have arrangements with the state or local civil authorities for the confinement of prisoners.

d. Punishment.—Unlike the court-martial punishment of a person in military service, a court martial cannot punish a member of the Auxiliary Military Police by reduction in military grade or by forfeiture of pay and allowances. Analogous punishments might be imposed, such as reduction in grade in the guard organization or temporary suspension from duty. A fine, as distinguished from forfeiture, is regarded as an appropriate form of punishment.

e. Dealing with civil authorities.—When a member of the Auxiliary Military Police

injures or kills a person while in the performance of his duties, he will be arrested and detained. If a civil police official seeks to arrest him, the plant guard officer, under the authority of the 74th Article of War, may refuse to release the individual until such release is approved by the commanding general of the service command. A member of the Auxiliary Military Police is entitled to the same protection as a sentinel under similar circumstances. If a writ of habeas corpus is issued for a member of the Auxiliary Military Police held to answer by the military, the procedure of chapter XXVII, Manual for Courts Martial 1928, should be followed.

f. Recognition of meritorious conduct.

(1) Members of the Auxiliary Military Police are eligible for the decoration "Medal of Merit" authorized by the President for award to civilians who distinguish themselves by exceptionally meritorious conduct or by performance of outstanding services. (See Bull. 1, WD, 1943.) All cases of members of the Auxiliary Military Police who, in the opinion of the plant guard officer, deserve consideration for this award will be referred through channels to the office of the Provost Marshal General for transmission to the Medal of Merit Board. A full statement of facts and appropriate recommendations will be included.

(2) Any case of meritorious conduct which in the opinion of the plant guard officer does not warrant recommendation for the award of the Medal of Merit, but which he deems deserving of official commendation, will be the subject of a special order of commendation issued by the commanding officer having jurisdiction over the

guard force (see par. 4c). Such special orders will be issued promptly and with liberality, and will be given appropriate publicity, particularly among the guard force concerned. A copy of each such special order will be furnished to the employer.

g. Prior instructions rescinded.—The instructions contained in all other letters and circulars concerning the organization, training and command of plant guard forces except the attached letter are rescinded.

(SPX 231.43 (2-27-43) SPMGS-MP-FH)

By command of Lieutenant General SOMERVELL:

W. D. STYER,
Major General, General Staff Corps,
Chief of Staff.

Official:
H. B. LEWIS,
Brigadier General,
Adjutant General.

1 Incl.

WAR DEPARTMENT
THE ADJUTANT GENERAL'S OFFICE
WASHINGTON

AG 231.43 (7-2-42) MS-SPAAM-M

JULY 2, 1942.

Subject: Military Organization of Plant Guard Forces.

To: The Commanding General,
Matériel Command, Army Air Forces;
The Provost Marshal General;
The Chiefs of Supply Services.

1. Guard forces at all War Department plants, posts and stations controlled or

operated by the Supply Services or by the Army Air Forces, and at all plants assigned for protective survey and inspection to the Chiefs of Supply Services and to the Commanding General, Matériel Command, Army Air Forces, are to be organized, drilled and instructed as military units subject to the Articles of War. (Art. 2 (d).)

2. These guard forces will be organized as a civilian auxiliary to the Military Police in all ammunition plants and plants where the possibility of sabotage is greatest, giving first priority to those plants which are most vulnerable from the standpoint of sabotage activities. The organization of these civilian guard forces will be extended as rapidly as conditions permit to civilian plants having important government contracts. Priorities will be established in collaboration with The Provost Marshal General.

3. At the time any guard force is organized as a civilian auxiliary to the Military Police, the commanding officer having jurisdiction over the guard force will:

a. Cause the Articles of War prescribed by Article 110 thereof to be read and explained to each member of the guard force;

b. Issue orders and regulations setting forth the duties and responsibilities of the guard force;

c. Organize each guard force with a member of the Army of the United States in command and cause each force to be drilled and instructed with a view to supplementing the Army in resisting attack on war material, war premises, and war utilities which the force is assigned to guard.

d. Require each member of the guard force to give a pledge of loyalty to the United States, and to execute an agreement acknowledging that such Articles of War are understood by him and that he is subject to the military law as long as he remains a member of the guard force. (A draft of a form of such agreement is attached.)

By order of the Secretary of War:

(S) J. A. Ulio,
J. A. ULIO,
Major General,
The Adjutant General.

1 Inclosure.
Draft of Agreement.

COPIES FURNISHED:
The Under Secretary of War;
The Commanding Generals, Army Air Forces; Services of Supply;
The Inspector General;
The Judge Advocate General;
The Chief of Administrative Services;
Staff Divisions of the Services of Supply;
Divisions of the War Department General Staff.

Agreement between the United States of America and _____
(Plant Guard)

In order that th existing military forces of the United States may be most effectively employed in combat activity against the enemies of the United States, the United States is approving the employment of certain guards as a civilian auxiliary to the military police for the purpose of guarding and protecting war material, war premises and war utilities from injury or destruction by the enemy or otherwise,

including the making of arrests, as peace officers for violations of Federal laws, as well as for violations of orders and regulations issued by military authority. The United States requires that only persons physically fit, well trained in the use of arms and in the duties incident to their position, and of unquestionable loyalty to the United States be so employed.

Now, therefore, I, _____, who have been or am about to be employed by _____ as a guard at _____ for the purpose of guarding certain war material, war premises, and war utilities, in consideration of my employment or the continuation of my employment, do agree with the United States of America that:

(1) I will support and defend the Constitution of the United States against all enemies, foreign and domestic;

(2) I will bear true faith and allegiance to the Constitution of the United States;

(3) I will well and faithfully discharge my duty as a civilian auxiliary to the military police to protect war material, war premises, and war utilities against all enemies, foreign and domestic, and will obey any orders issued in connection therewith by the President, as Commander-in-Chief of the Army and Navy of the United States, and by his duly authorized officers.

(4) I acknowledge that the appropriate Articles of War have been read and explained to me, and that in the performance of my duty to protect such war material, war premises, and war utilities, I am subject to military law during the period of my employment.

_____

(Signature of Plant Guard)

Inclosure to letter, July 2, 1942, AG 231.43 (7-2-42) MS-SPAAM-M.

APPENDIX C

The duties and status of plant guards as defined in the *Dictionary of Occupational Titles.*

GATEMAN—(IV) (any ind.) gate tender; gatekeeper; guard; plant-protection man; watchman, gate. 2-61.01. Stands guard at entrance gate of an industrial plant and grounds, warehouse, or other property, admitting employees and authorized visitors and refusing entrance to unauthorized or unwanted persons; issues passes at own discretion or on instructions from superiors; directs people to various parts of plant or building. May keep count of trucks or other carriers entering and leaving. May perform maintenance duties such as mowing lawns and sweeping gate areas.[1]

WATCHMAN—guard; patrolman; special police; man (any ind.). (I) 2-61.03. Guards an industrial plant, warehouse, or other property against fire, theft, and illegal entry; makes periodic inspection tours about building and grounds, examining doors, windows, and gates to see that they are properly secured and have not been tampered with, and continually watches for irregularities, such as broken water pipes; registers at regular watch stations as a record of having made inspection rounds at specified times. May perform general maintenance duties, such as sweeping

[1] *Dictionary of Occupational Titles*, Part I, Definition of Titles (June 1939), Department of Labor (United States Government Printing Office), p. 408.

floors, or supervise others in these duties. May fire boilers or do other similar duties, or may operate various plant equipment performing productive operations. Sometimes specifically designated according to type of property he guards, as dock watchman, warehouse watchman.[2]

GUARD CAPTAIN—guard, chief; plant-police captain (any ind.) 2-61.71. Directs activities of guard force in protection of an industrial and commercial establishment against trespassing and damage; plans system of posts according to protection requirements of plant; selects and trains subordinates in their duties, including use of weapons, rescue work, and handling of riots or other emergencies; supervises identification of employees and visitors, by fingerprinting, interviewing, photographing, and preparation of badges; responds to calls from subordinates to take charge of protective measures during fires, riots, storms, or other emergencies; insures that safety rules are properly posted and enforced, and reports to appropriate authorities fire extinguishers and other safety apparatus that are not functioning. May maintain liaison with civil or military police authorities on mutual problems. May prepare periodic reports including items such as number of visitors admitted to plant or nature of internal disturbances.[3]

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[2] Op. cit., *supra*, p. 1006.

[3] *Dictionary, Occupational Titles Supplement*, Edition II, July 1943 (War Manpower Commission, Bureau of Manpower Utilization, Division of Occupational Analysis and Manning Tables) (United States Government Printing Office), pp. 144-145.

GUARD LIEUTENANT—guard, chief, assistant; police lieutenant (any ind.) 6–21.71. Assists in enforcing regulations formulated by GUARD CAPTAIN for establishments employing a large protective force, such as arranging work schedules, making periodic inspection of uniforms, and preparing personnel time records. Usually performs duties of GUARD CAPTAIN in his absence. May direct air raid precaution program.[4]

GUARD SERGEANT (any ind.) 2–61.70.—Directs a group of GATEMEN IV, WATCHMEN I and other workers engaged in protection of an industrial plant against damage and trespassing; assists GUARD CAPTAIN or GUARD LIEUTENANT in training and assigning of subordinates; enforces discipline and vigilance on part of subordinates; investigates reports of disturbances; in event of emergencies, such as fire, storm, or riot, takes charges of policing to maintain order, safety to personnel, and to protect plant property; acts as representative of GUARD CAPTAIN in identification of employees and visitors. May call superiors in emergencies.[5]

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[4] Op. cit., *supra*, p. 145.
[5] *Ibid.*

APPENDIX D

MAY 7, 1943.

The Honorable The SECRETARY OF WAR:

DEAR MR. SECRETARY: This will refer to your letter of April 21, 1943, furnishing certain information as to the status of the "Civilian Auxiliary Military Police" organized for the purpose of protecting various industrial plants producing for the war effort. This letter will also refer to a letter to me of March 31, 1943, from Lt. Col. Elbert M. Barron, Chief of the Litigation Division of the Office of the Judge Advocate General, transmitting a letter reciting the details of an assault upon a member of the plant protective forces at the Ford River Rouge Plant at Detroit and calling for federal protection of members of these plant protective forces. Lt. Col. Barron's letter requests the advice of this Department in reference to the matters presented.

An examination of the basic authority pursuant to which the "Civilian Auxiliary Military Police" was organized, including Executive Order 8972, the various statutes providing for the composition of the armies of the United States, and the Articles of War, leads me to conclude that there is no legal basis for the militarization of these plant protective forces. Nor, in my opinion, is there any basis for considering members of these plant protective forces as civil officers or employees of the government. All of the conditions under which these guards are employed and operate

indicate that they are not more than private employees of the particular industrial plant which hires, fires and pays them, with no greater authority or rights than any other private plant employee. Moreover, if members of these plant protective forces were to be regarded as having any federal status, military or civil, the fact that they received their pay from private sources would appear to violate the provisions of Section 66 of Title 5 of the United States Code.

Under the circumstances this Department would not be justified in taking any action under federal law in defense of these guards. Therefore the situation presented by Lt. Col. Barron's letter is not one for action by this Department.

With kind regards,

Sincerely yours,

(Signed) FRANCIS BIDDLE,
Attorney General.

U. S. GOVERNMENT PRINTING OFFICE: 1947

COPY

Supreme Court of the United States

OCTOBER TERM, 1946

NO. 418.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

JONES & LAUGHLIN STEEL CORPORATION,
Respondent.

BRIEF FOR JONES & LAUGHLIN STEEL CORPORATION, RESPONDENT, OPPOSING THE PETITION FOR CERTIORARI.

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INDEX.

	PAGE
Counter-Statement of the Case	1
Summary of Argument	7
Argument	8
I. Whether it was right or wrong, the manner in which the Court below considered the new circumstances cannot justify a review of its decision of this case	8
II. Properly considered, the Record presents no case which should now be reviewed or decided by this Court	10
1. Properly considered, the case presents only a question of the status of auxiliary military policemen under the National Labor Relations Act	10
2. The status of auxiliary military policemen under the Act is now of no general or immediate importance, because the military police force has been wholly disbanded	11
3. The important underlying question: that of the Board's powers and duties in cases involving municipal police, foremen and other similar classes of people, can and will be presented more fairly in other cases which will almost certainly be laid before this Court in the near future	13
(a) In the view of the Steel Corporation, this case does raise a question of general importance	13

PAGE

(b) However, the Petition for Certiorari is based upon the contention that the important question is not raised in this case 16

(c) The important question is more fairly raised in other cases which will almost certainly be laid before this Court in the near future 17

Conclusion 18

TABLE OF CASES.

A. F. of L. v. N.L.R.B., 308 U.S. 401; 84 L. Ed. 347 (1940) 3

Budd Wheel Co., In re, 52 N.L.R.B. 666 (1943) 13

District of Columbia v. Sweeney, 310 U.S. 631; 84 L. Ed. 1402 (1940) 12

Law v. U.S., 226 U.S. 494; 69 L. Ed. 401 (1924) 8

Maryland Drydock Company, In re, 49 N.L.R.B. 733 (1943) 13

Mercelis v. Wilson, 235 U.S. 579; 59 L. Ed. 370 (1914) 8

N.L.R.B. v. Delaware-New Jersey Ferry Co., 128 Fed. (2d) 130 (3 C.C.A., 1942) 14, 15

N.L.R.B. v. Jones & Laughlin Steel Corp., 146 Fed. (2d) 718 (6 C.C.A., 1944) 4

N.L.R.B. v. Jones & Laughlin Steel Corp., 154 Fed. (2d) 932 (6 C.C.A., 1946) 7

PAGE

N.L.R.B. v. Newport News Shipbuilding Co., 308 U.S. 241; 84 L. Ed. 219 (1939) 9

Packard Motor Car Company v. N.L.R.B. No. 658 October Term, 1946 (See: 157 Fed. (2) 80, 6 C.C.A., 1946) 17

Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177; 85 L. Ed. 1271 (1941) 14

Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146; 85 L. Ed. 1251 (1941) 15

R.C.A. Manufacturing Co. and U.E.R. Workers, In re, 2 N.L.R.B. 159 (1938) 15

Rochester and Pittsburgh Coal Co., In re, 56 N.L.R.B. 1760 (1944) 13

Soss Manufacturing Co., In re, 56 N.L.R.B. 348 (1944) 13

Southern California Gas Co. and U.W.O.C., 10 N.L.R.B. 1123 (1939) 15

Southern Steamship Co. v. N.L.R.B., 316 U.S. 31; 86 L. Ed. 1246 (1942) 14

U.S. v. Memphis, 97 U.S. 284; 24 L. Ed. 937 (1878) .. 8

Wallace Corp. v. N.L.R.B., 323 U.S. 248; 89 L. Ed. 216 (1944) 3

Supreme Court of the United States

OCTOBER TERM, 1946

NO. 418.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

JONES & LAUGHLIN STEEL CORPORATION, Respondent.

BRIEF FOR JONES & LAUGHLIN STEEL CORPORATION, RESPONDENT, OPPOSING THE PETITION FOR CERTIORARI.

COUNTER-STATEMENT OF THE CASE.

On March 15, 1943, the United Steelworkers of America (CIO), the Union involved in this case, filed with the National Labor Relations Board a petition under Section 9 (c) of the National Labor Relations Act by which it sought to be qualified as the "exclusive representative," for the purposes of that Act, of the force of about sixty plant police then employed at the Otis steel works of the respondent Jones & Laughlin Steel Corporation in Cleveland, Ohio (R. 1-2).

In the course of a hearing held by the Board upon this petition, at Cleveland, on April 8, 1943 (R. 2), it was shown

1. That the Otis Works was a large, integrated steel manufacturing establishment, then devoted largely or wholly to the production of war materials and munitions (R. 4);

2. That the members of the force of plant police had all been sworn and enrolled as members of the Auxiliary Military Police organization, an agency of the United States Army (R. 6-7, etc.);

3. That the members of the militarized police force were wholly responsible to the Steel Corporation (which paid their salaries) and to the Army (which had the legal power to direct their work) for the maintenance of law, order, discipline and security in the Works and amongst a force of about 4,700 mechanics, artisans and laborers regularly employed in the Works, in the production of steel and the maintenance of the plant (R. 6-12); and

4. That the Union, which sought to be qualified as "exclusive representative" of the militarized plant police, had for a long time been qualified and was then acting as "exclusive representative" of the 4,700 operative steel workers and maintenance men (R. 5; 15, etc.).

Relying upon these, the facts in the record, the Steel Corporation urged that the Union's petition be dismissed (R. 53); but in a decision published on May 3, 1943, the Board rejected the Company's contentions (R. 52-55), and determined to hold an election by secret ballot, testing the desires of the policemen in the matter. At the election, held May 26, 1943, a majority of the ballots favored the Union (R. 33) and on June 5, 1943, the Board issued a Certification of the Union as exclusive representative of the entire police force (R. 34-35).

With this Certification in hand, the Union demanded that the Company recognize it and bargain with it as representative of the policemen, maintaining of course its position as representative also of the thousands of rank and file steel workers in the Works. This demand was rejected[1] (R. 55-56); and thereupon the Union commenced further proceedings before the Board—of the kind contemplated by Section 10 of the Act. In these proceedings the Board held further hearings, on September 28, 1943 (R. 41). At the further hearings, no new fact of significance here was added to the record; but at the hearing and in the proceedings which followed the Company renewed its contentions, amongst them the contention that a Union of the rank and file steel workers could not be legally qualified to represent the policemen.[2] The contrary assertion made at page 28 of the petition for certiorari reflects a serious error of fact on the part of the petitioner.

On December 2, 1943, the Board handed down its Final Order in the case (R. 73), adopting the Intermediate Report of its Trial Examiner (R. 61), rejecting the Steel Corporation's contentions of law, and commanding the Company to recognize the Union as repre-

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1. Although the precise point of law may not have been settled, it is believed that the Certification had no legally compulsive force or effect (see *A. F. of L. v. N.L.R.B.*, 308 U.S 401; *Wallace Corp. v. N.L.R.B.*, 323 U.S. 248); and that the Steel Corporation was bound to deny it any force, if it desired to contest the Union's qualifications in the Courts.

2. See, for example, the Company's exceptions to the Intermediate Report of the Board's Trial Examiner (R. 68-69, etc.) and its statement of its position (R. 50) offered in evidence at the Board's hearing of September 21, 1943 (R. 60):

> "The corporation moved to dismiss the petition [of the Union for Certification] because the Petitioner is the same labor organization that represents production and maintenance employees in all of its steel plants * * *."

sentative of the police. On February 1, 1944, the Board filed a petition for enforcement of its Order in the Sixth Circuit Court of Appeals (R. 76). This petition was resisted by the Company; and on October 16, 1944, the case was argued before the Court. On December 8, 1944, the Court handed down its decision (R. 83), now reported as *N.L.R.B. v. Jones & Laughlin Steel Corporation,* 146 Fed. (2d) 718; and thereby denied the Board's petition, and held the Board's decision legally wrong, upon the grounds, principally, that by attempting to subject the plant police to the jurisdiction of the rank and file steel workers' Union, the Board had failed to give proper weight to the public need, in time of war, that such militarized guards be free from any control, direct or indirect, by the rank and file against whom they were duty-bound to enforce the law.

In the meantime, the military status of the Otis Works policemen had changed. On August 5, 1944, more than two months before the argument in the Circuit Court and about four months before its decision, they had been "demilitarized," or discharged from their enrollments in the military police service, pursuant to a change in the Army's general plans; and they had, almost simultaneously been sworn and enrolled instead (according to the Army's new plans) as members of the municipal police force of the City of Cleveland, and so as peace officers of the State of Ohio (R. 114-115; 121-122).[3]

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3. The assertions made by the Board, at page 16 of the Petition for Certiorari and elsewhere in its arguments, that the Otis Works police have always been members of the Cleveland police force is not supported by the record or in accord with the facts. Before the late war, the plant police were also City police; during the period of "militarization" they were not; and then, after their "demilitarization" they re-

This change, which may or may not have been known to the Board, but which had not previously been called to the attention of the Circuit Court of Appeals, was made known, in part, to that Court in a Petition for Rehearing, filed by the Board on January 8, 1945 (R. 89, 93), and then, again in part, to this Court in the Board's Petition for Certiorari filed here at docket No. 1237 October Term, 1944 (p. 27). In each instance, the Board's pleading disclosed that the guards had been "demilitarized," but it did not disclose (and it is possible that the Board did not know) the related fact that, at about the same time, and as a part of the same transaction, the demilitarized guards had acquired the status of municipal police.

In a memorandum order entered on June 4, 1945 (325 U.S. 838) this Court granted the Board's petition, vacated the decision of the Circuit Court of Appeals, and remanded the case to that Court, "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof upon the Board's orders." In due course, the record was remanded and on February 8, 1946, the case was called for further argument in the Circuit Court of Appeals.

In the meantime, at the instance of the Board, counsel for both parties had stipulated the accuracy of a written description of the changed circumstances of the plant policemen, including the facts that they had been demilitarized and made members of the Cleveland police

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newed their connections with the City police force. This is important because, contrary to the Board's assumption, it shows that while the case was pending before the Board, no municipal police status could have been claimed for the military guards.

force, and the fact that their functions and duties as municipal police were the same, in all essentials, as they had been during the period of militarization (R. 114-118).

When the case was called for argument in the Circuit Court, the Board presented this stipulation as an exhibit to a new motion for enforcement of its original order (R. 112-114), and called upon the Court to consider the facts set forth in the stipulation, and upon such consideration thereof to enter a decree enforcing the Board's original, final order. In reply to this argument, the Steel Corporation contended, in both its written and oral presentations of the case, that the Court could not consider any such new fact, or any fact not disclosed in the record certified by the Board at the outset of the case; and, secondly, that whether the new facts be considered or not, the Court should reaffirm its original decision, and again deny enforcement of the Board's order.

On April 4, 1946, the Circuit Court entered a new decision of the case. Upon the propriety of its consideration of the new facts set out in the stipulation, it upheld the Board, and—interpreting the mandate of this Court as the Board had interpreted it—expressly rejected the Steel Corporation's contention that the new facts could not be considered. But upon the other question presented by the parties: the question whether the changed circumstances shown in the stipulation called for a change in the Court's original decision of the case, the Court upheld the Steel Corporation and rejected the contentions of the Board, holding again that the Board's order must be denied enforcement (R. 118-122):

N.L.R.B. v. Jones & Laughlin Steel Corporation, 154 Fed. (2d) 932.

This is the decision which the Board seeks to present for review, by its present petition for certiorari. To complete a history of the case, it is necessary to add to what has been said, only that on May 20, 1946, the Court below denied (R. 134) a petition for rehearing which had been filed by the Board (R. 123-134).

SUMMARY OF ARGUMENT.

I. Whether it was right or wrong, the manner in which the Court below considered the new circumstances cannot justify a review of its decision of this case. The Court disposed of this matter in the manner urged upon it by the Board, and opposed by the Steel Corporation. Even if this was wrong, the Board cannot complain of an error resulting from its own intentional conduct of its case.

II. Properly considered, the record presents no case which should now be reviewed or decided by this Court.

1. Properly considered, the record presents only a question of the status of auxiliary military policemen under the National Labor Relations Act.

2. The status of auxiliary military policemen under the Act is now of no general or immediate importance, because the military police force has been wholly disbanded.

3. The important underlying question: that of the Board's powers and duties in cases involving

municipal police, foremen and other similar classes of people, can and will be presented more fairly in other cases which will almost certainly be laid before this Court in the near future.

ARGUMENT.

I. Whether It Was Wright or Wrong, the Manner in Which the Court Below Considered the New Circumstances Cannot Justify a Review of Its Decision of This Case.

It is elementary that if a party to litigation invites and so brings about some ruling or course of action on the part of the Court, he cannot complain later that the ruling or course of action was wrong. He is estopped by one of those principles of equity, common sense and fair dealing which are indispensable to the orderly procedure of the business of the Courts. The rule is illustrated in:

U. S. v. Memphis, 97 U.S. 284
Law v. U.S., 266 U.S. 494
Mercelis v. Wilson, 235 U.S. 579

—and many other cases.

This rule condemns wholly the first, and apparently the principal, of the "reasons" urged by the Petition for Certiorari as grounds for the allowance of the writ in this case. Beginning its statement of this "reason" at page 26 of the Petition, the Board argues for page after page that, under the National Labor Relations Act a reviewing Court can only review facts and questions which have been passed upon by the Board, and embodied in the Board's transcript of its own record filed with the

Court; that, as a result, the Court below should not have considered the additional facts set out in the Stipulation (R. 114); and that its consideration of those facts calls for the reversal of its decision.

Under the rule of law, this argument is not open to the Board in this case. In the Court below, its premises were argued by the respondent, and resisted by the Board. The Board procured the Stipulation, presented it to the Court, and urged the Court to consider it, against the most vigorous objections by the respondent that, under Section 10 (e) of the Act and the decision in *N.L.R.B. v. Newport News Shipbuilding Co.*, 308 U.S. 241, the Court must consider no fact not disclosed in the original transcript. When it considered the Stipulation, the Court took the course urged on it by the Board; and, whether it was right or wrong in so doing, the Board cannot be heard to criticize its decision on this account.[4]

4. Throughout the case, the Board has shown an irritating disregard for the very rule it relies upon in this part of its present argument. It has never been restrained from asserting any matter of fact, by the absence of any proof of it in the record. For example, in the present Petition for Certiorari, the Board treats as a fact of the case an important new matter of which it was, "following the close of the hearing, advised by its regional director" (Petition, p. 13). It refers to facts developed by "a survey by the Board which has not yet been completed" (Id. p. 27). It describes, in a fragmentary and inaccurate way, the alleged experiences of other employers, in other industries formerly served by militarized guards (Id. p. 35). None of these things can be the subject of judicial notice, and none was ever the subject of any offer of evidence in this case. The Board's reliance upon them here shows either that this case was not properly prepared or fairly presented, while it was pending before the Board, or else that there was not, at that time, any case worthy of presentation.

II. Properly Considered, the Record Presents No Case Which Should Now Be Reviewed or Decided by This Court.

1. *Properly considered, the case presents only a question of the status of auxiliary military policemen under the National Labor Relations Act.*

If it be true, as the respondent has always contended and as the Board now agrees, that the scope of judicial review in this case is limited to a consideration of the evidence received by the Board in due form prior to its decision of December 2, 1943 (R. 73) and of questions of law arguable on that evidence, then it must follow that the only question which can be decided by the Courts is a very narrow one: Can the National Labor Relations Board confer upon a Union, dominated by the thousands of rank and file steel workers employed in war time in a steel plant devoted to the manufacture of munitions of war, a legally enforceable right to act as "exclusive representative" of the force of military police who must be relied upon by the plant owner, the Army and the public at large to enforce the law in the plant and to prevent its injury by acts of sabotage or trespass?

This was the question, and the only question, ultimately raised by the pleadings and evidence contained in the record made in this case before the Board.

2. *The status of auxiliary military policemen under the Act is now of no general or immediate importance, because the military police force has been wholly disbanded.*

On December 8, 1943, when the Court below handed down its original decision of this case, the security of war plants, such as the Otis Works, was a matter of peculiar public concern. The success of the war effort depended, it seemed, upon the security of manufacturing plants against interrupted or demoralized operations. And in cases involving such great industrial establishments as the Otis Works, the security of the productive plants depended, in turn, wholly or almost wholly upon the efficiency of the forces of auxiliary military policemen, in the discharge of their duties. These policemen were of necessity relied upon by the public at large to detect and if possible to prevent any act of trespass or sabotage, or other wrongful character likely to interrupt or hamper war production or to demoralize war workers, and to make possible the lawful redress of such acts, where prevention should not be successful.

The importance of these functions of the auxiliary military police was not changed by their "demilitarization," coupled as it was with their enrollment as members of state and city police forces. This was made clear, for example, by the order "demilitarizing" the force of police at the Otis Works (R. 117-118). Instead, the policy of demilitarization served only to transfer from the Army to the other, local authorities a substantial part of the burdens of directing and supervising this phase of the general security program, at a time when the Army's other burdens must have seemed sufficient to tax its resources of officers and men.

Remembering all the circumstances of that period of our history, it seems plain that the status of the auxiliary military police as regarded the industrial labor unions was—at that time—a matter of great public importance. It seems equally plain that a judicial decision intended to avoid any threat against their efficiency was a proper decision; and that the original decision of this case by the Court below was, for that reason, the only proper disposition of the case.

But, whether it was right or wrong, that decision was intended to settle a question which does not exist today. The war is over, and the organization of auxiliary military police has long since served its purpose, and no longer exists. The legal status of auxiliary military police, under the National Labor Relations Act, is, today and in itself, a matter of no general or immediate importance to anybody. Thus the principal question originally raised in this case is, in a broad sense, a moot question, of the kind which does not call for or justify the consideration of this Court. See *District of Columbia v. Sweeney,* 310 U.S. 631.

3. *The important underlying question: that of the Board's powers and duties in cases involving municipal police, foremen and other similar classes of people, can and will be presented more fairly in other cases which will almost certainly be laid before this Court in the near future.*

(a) IN THE VIEW OF THE STEEL CORPORATION, THIS CASE DOES RAISE A QUESTION OF GENERAL IMPORTANCE.

In both of its decisions of this case, the Circuit Court of Appeals accepted as sound the proposition that if, as "exclusive representative" a union has the legal power to control the conditions upon which any particular individual may hold and do his job, and earn his living, then the constituent individual must be subject, in some degree, to at least potential domination by the union—which means by the union's leaders, or ultimately by the mass of members who can, if they choose, control the leaders. This proposition had long been accepted by the Board itself:

In re Maryland Drydock Company, 49 N.L.R.B. 733 (1943);

In re Budd Wheel Co., 52 N.L.R.B. 666, 668-9 (1943);

In re Soss Manufacturing Co., 56 N.L.R.B. 348 (1944);

In re Rochester, etc. Coal Co., 56 N.L.R.B. 1760 (1944).

In the same way, in both of its decisions herein, the Court below accepted as sound a second, closely related proposition, which, likewise, had long been accepted by

the Board itself: the proposition that under the Act the Board must draw a line between supervisors, foremen, policemen and others whose undivided allegiance is indispensable to the proper functioning of management, on the one hand, and, on the other, those classes of labor whose functions (in so far as they concern any public interest) are not incompatible with allegiance to labor unions; and that the Board must, while encouraging union organization of the latter class, avoid enforcing union jurisdiction or domination of the former. This was the principle of the Board's decisions of the four cases just cited, and of many others in which it has described the limits of union jurisdiction. It was the principle of such judicial precedents as *N.L.R.B. v. Delaware-New Jersey Ferry Co.*, 128 Fed. (2) 130 (3 C.C.A., 1942). It was consistent with every judicial interpretation of the Act, including the decisions of this Court in such cases as *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, and *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31. It has never been doubted or rejected by any Court; and it has been abandoned by the Board only in a series of mutually related cases, all very recently decided.

Accepting the interpretation of the Act implied in these two principles, accepting, that is, the view that the "policy of the Act" is among other things to protect every sound public interest, the Court below was bound to deny enforcement of the Board's order. If the Act, properly interpreted, requires the Board to set any limit upon the scope of union jurisdiction under the Act (and it is hard to conceive that Congress intended to leave this to employers or employees or to unions, ignor-

ing the interests of the public[5]), the only line that can be drawn is that long recognized by the Board itself —the line between management and labor. If the line is to be drawn at that point, and if such militarized police as have figured in this case are on either side of the line—if they are "employees" for any purpose and not purely governmental agents and so exempt from the scope of the Act—then they must be placed on the management side of the line. As the Board (and the unions) recognized until 1941 or 1942,[6] the members of the police force in any large industrial plant are an essential part of the executive arms of private management and public law, who must, if they are to serve as anything much more than ornaments, be free to stand up for the interests of management and the law, when those interests are threatened by any other force—including that of the unionized rank and file. In this particular case, the "militarization" of the policemen, and the other circumstances of the case which were incidents of the World War, emphasized the public need for the efficiency and freedom of the policemen, whether they changed the status of the policemen under the Act or not.

In its recent decisions, in this case and in those others which are referred to and reflected in the Petition for Certiorari, the Board has attempted to abandon the

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5. Cf.: *N.L.R.B. v. Delaware-New Jersey Ferry Co., supra;* and *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, at page 165: "As a standard [in setting the limits of bargaining units under Section 9 of the Act] the Board must comply, also, with the requirement that the unit selected must be one to effectuate the policy of the Act * * *."

6. See, *e.g.*: *In re R.C.A. Manufacturing Co. and U.E.R. Workers*, 2 N.L.R.B. 159 (1938); *Southern California Gas Co. and U.W.O.C.*, 10 N.L.R.B. 1123 (1939), and later Board decisions to the same effect, prior to 1942.

management-labor line as its limit of union jurisdiction. This new tendency on the part of the Board has encouraged a rather general movement on the part of the Unions in which the tendency originated: a systematic movement by the Unions in certain industries to extend their jurisdiction and their economic influence by organizing and seeking the legal right to represent segments of management. This movement, so encouraged, has given rise to one of the principal issues in controversy today between industrial employers and labor unions; and to the extent that it may have decided this issue, by requiring the Board to avoid enforcing the representation of both management and labor by a single Union, the decision of the Circuit Court of Appeals in this case presents a question of great and general importance.

It does not follow, however, that the Petition for Certiorari should be granted. Instead, for at least two reasons, it should not.

(b) However, the petition for certiorari is based upon the contention that the important question is not raised in this case.

Of these two reasons for denying a review of this case, the first is that the Petition for Certiorari contends that, because the question of the Board's power had not been raised by the record before the Board, the Circuit Court of Appeals had no power to decide it. If that assumption of the petition were to be accepted,[7] it would

7. It is, of course, the contention of the respondent Steel Corporation that, for reasons which are discussed above, the question of the Board's power to enforce recognition of a single union as representative

follow that this Court could have no power, were the Petition for Certiorari granted, to decide the only really new or important question which can possibly be dealt with in this case by this Court.

(c) THE IMPORTANT QUESTION IS MORE FAIRLY RAISED IN OTHER CASES WHICH WILL ALMOST CERTAINLY BE LAID BEFORE THIS COURT IN THE NEAR FUTURE.

It has been observed that, because of its importance to industry, to labor unions and to the public, the question of the Board's powers and duties in cases in which unions desire jurisdiction of supervisors, foremen, policemen or others traditionally identified with industrial management and not with Union labor, is such a question as will ultimately deserve the consideration of this Court. Should the Court see fit to consider and decide it, however, there is no particular reason to choose this case as the occasion for such a review. Several other cases presenting the question more fairly either have been laid before this Court or will soon be laid before it, unless in the meantime the question becomes much less important than it now appears. As the Board indicates in its Petition for Certiorari (p. 36), a phase of the question is presented in the Petition for Certiorari now pending here in *Packard Motor Car Company v. N.L.R.B.*, No. 658 October Term, 1946; and the precise question is presented by the records in the cases involving the Pittsburgh Works of the Jones & Laughlin

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of both management and labor was duly raised before the Board and therefore open to consideration by the Court below. An inspection of the Board's original brief in that Court will show that it there treated the question of its power and duty in such a matter as the principal question in the case.

Steel Corporation, pending since 1942 before the Board but still undetermined (see Petition for Certiorari, p. 28) and in two cases now awaiting decisions, respectively, in the Eighth and Tenth Circuits (Petition, p. 27, note 17). It is squarely raised also in many other cases pending before the Board or in the lower Courts, amongst them in the Board's case No. 6-R-1191, in which the United Mine Workers of America, a rank and file labor Union, has sought jurisdiction of the underground supervisory forces in the coal mines of the Jones & Laughlin Steel Corporation.

If any of these other records shall be reviewable by this Court (and some of them are certain, it appears, to be offered for such a review), the important question will be presented fairly and cleanly. It will not be confused, as it must be here, by such abnormal circumstances as the "militarization" of the Otis Works police, the unusual public importance of such policemen in time of war, and the Board's peculiar contention that the important question is not properly raised in this record.

Conclusion.

It is submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent, Jones & Laughlin Steel Corporation.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1946

NO. 418

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

JONES & LAUGHLIN STEEL CORPORATION,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT

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INDEX.

PAGE

Official Reports of the proceeding in the Court below, and before the Board 1

Counter-Statement of the Question Involved 2

Counter-Statement of the Case 3

Summary of Argument 10

Argument 12

I. To decide the important question presented here, it is unnecessary to determine whether the Court below should have decided the case upon the record made before the Board alone, without considering the additional facts stipulated and laid before it by the Board 12

1. The Board's criticisms of the Circuit Court's procedure are wholly untenable, both in fact and in law 12

2. And at all events, the question of procedure raised by the Board is of no controlling importance in the case 17

II. Under the National Labor Relations Act, the Labor Board cannot command that a Union, which is qualified as exclusive representative of the rank and file steelworkers in a large steelworks, shall be recognized at the same time as exclusive representative of plant police who represent management and the public in the exercise of control over the rank and file 18

PAGE

1. The Board has, until very recently, recognized its duties, under the Act, to limit union organization at the line between labor and management, and to forbid the representation of agents of management by rank and file unions..... 18

2. The new rule of law, recently established by the Board and presented here, differs from the new rule presented for consideration by the *Packard Motor Car Co.* case, now under advisement by the Court..... 27

3. By its reliance upon a literal reading of the Act, to support a wholly new interpretation, the Board has ignored the applicable canons of statutory interpretation.. 30

   (a) The canon preferring a reasonable over a literal construction)..... 30

   (b) The canon which had given an almost conclusive presumption of correctness to the Board's own long established, contrary interpretation 33

4. The Board's new rule, abolishing the line between non-union management and union labor, would subvert instead of effectuate the policies of the Act..... 36

   (a) This is a test of the validity of every order of the Board..... 36

   (b) The Board's new rule would violate the purpose of the Act to maintain the freedom of rank and file unions

PAGE

from any influence by representatives of management 37

(c) The Board's new rule would violate the purpose of the Act to avoid any unnecessary impairment of the functions of management..... 43

(d) The Board's new rule, if applied to the military or municipal police who figure in this case, would violate the purpose of the Act to avoid any infringement of the public interest in the preservation of law and order... 50

5. In the separation of non-union management and union labor contemplated by the Act, the police involved here must be classified as agents of management..... 54

6. The status of policemen under the Act is not affected by the inconclusive experiences described in the Board's brief..... 63

7. The status of the policemen who are involved in this case is not affected by their "demilitarization" 66

III. Conclusion 69

Appendix:

Correspondence between counsel for the Board and for the respondent, concerning the stipulation of facts filed in the Circuit Court of Appeals 71

PAGE

"Constitution of International Union United Steelworkers of America, CIO," Oath and Obligations of members of the Union..... 78

National Labor Relations Act (49 Stat 449)

Section 1 "Findings and Policy"..... 80

Section 2 "Definitions":
2 (2) "Employer" 81
2 (3) "Employee" 82

Section 3 (c) Annual Report of Board.... 82

Section 7 "Rights of Employees"..... 82

Section 8 Unfair Labor Practices..... 82

Section 9 "Representatives and Elections"..... 83

Section 10 "Prevention of Unfair Labor Practices" 85
10 (a) Jurisdiction of the Board.. 85
10 (b) Procedure before the Board 85
10 (c) Decisions by the Board.... 86
10 (e) Petitions for Enforcement of Board Orders..... 86
10 (f) Petitions for Review of Board Orders 88

Section 16 Title of Act..... 88

TABLE OF CASES.

PAGE

American Forge Co., In re, 44 N.L.R.B. 826 (1942) .. 63
American Machine & Foundry Co., 14 N.L.R.B. 497 (1939) 60
Armour & Co., 13 N.L.R.B. 1143 (1939) 60
Armour & Co., 26 N.L.R.B. 1046 (1940) 61
Automotive Maintenance Co., 13 N.L.R.B. 338 (1939) 60

F. E. Booth Co., 10 N.L.R.B. 1491 (1939) 60
Burnside Steel Foundry, 7 N.L.R.B. 714 (1938) 60

J. I. Case Co. v. N.L.R.B., 321 U.S. 332; 88 L. Ed. 762 (1944) 54
Century Metalcraft Co. v. F.T.C., 112 Fed. (2d) 443 (7 C.C.A., 1940) 15
Church of the Holy Trinity v. U.S., 143 U.S. 457; 36 L. Ed. 226 (1892) 31
Cleveland Hobbing Machine Co., 18 N.L.R.B. 412 (1939) 61
Consolidation Edison Co. v. N.L.R.B., 305 U.S. 197; 83 L. Ed. 126 (1938) 43

Davis v. Department of Labor, 317 U.S. 249; 87 L. Ed. 246 (1942) 34

Elliott Bay Lumber Co., 9 N.L.R.B. 3 (1938) 60

H. J. Heinz Co. v. N.L.R.B., 311 U.S. 514; 85 L. Ed. 309 (1941) 41

Indiana Quartered Oak Co. v. F.T.C., 58 Fed. (2d) 182 (2 C.C.A., 1932) 15
Ingram-Richardson Mfg. Co., 9 N.L.R.B. 200 (1938) 60
Inland Steel Co., 9 N.L.R.B. 783 (1938) 60

PAGE

International Association of Machinists v. N.L.R.B., 311 U.S. 72; 85 L. Ed. 50 (1940) 42, 56, 57

Jones & Laughlin Steel Corporation, etc., In re, 49 N.L.R.B. 390 (1943) 2
Jones & Laughlin Steel Corporation, etc., In re, 53 N.L.R.B. 1046 (1943) 2
Jones & Laughlin Steel Corporation, In re, 66 N.L.R.B. 386 (March 7, 1946); 71 N.L.R.B. No. 203 (December 30, 1946; 19 L.R.R.M. 1108) 25, 28, 32, 44

Law v. U.S., 266 U.S. 494; 69 L. Ed. 401 (1925) 14

Magnolia Petroleum Co., 18 N.L.R.B. 380 (1939) ... 61
Markham v. Cabell, 326 U.S. 404; 90 L. Ed. 168 (1945) 32
Maryland Drydock Company, In re, 49 N.L.R.B. 733 (1943) 22, 28, 33
Memphis v. U.S., 97 U.S. 293; 24 L. Ed. 920 (1878) .. 14
Mercelis v. Wilson, 235 U.S. 579; 59 L. Ed. 370 (1915) 14

N.L.R.B. v. E. C. Atkins & Co., 147 Fed. (2d) 730 (7 C.C.A., 1945) 37
N.L.R.B. v. E. C. Atkins & Co., 155 Fed. (2d) 567 (7 C.C.A., 1946) 37, 65, 66
N.L.R.B. v. Delaware-New Jersey Ferry Co., 128 Fed. (2d) 130 (3 C.C.A., 1942) 52
N.L.R.B. v. Fansteel Metallurgical Corp., 306 U.S. 240; 83 L. Ed. 627 (1939) 32, 47
N.L.R.B. v. Indiana Desk Co., 149 Fed. (2d) 987 (7 C.C.A., 1945) 47
N.L.R.B. v. Jones & Laughlin Steel Corporation, 146 Fed. (2d) 718 (December 8, 1944) 1, 8

PAGE

N.L.R.B. v. Jones & Laughlin Steel Corporation, 154 Fed. (2d) 932 (6 C.C.A., April 4, 1946) 1, 9, 50
N.L.R.B. v. Jones & Laughlin Steel Corporation, 325 U.S. 838; 89 L. Ed. 1965 (June 4, 1945) 2, 8
N.L.R.B. v. Link Belt Company, 311 U.S. 584; 85 L. Ed. 368 (1941) 42
N.L.R.B. v. Newport News Shipbuilding Co., 308 U.S. 241; 84 L. Ed. 219 (1939) 15, 16
N.L.R.B. v. Packard Motor Car Co., 157 Fed. (2d) 80 (6 C.C.A., 1946) 29, 33
N.L.R.B. v. Pennsylvania Greyhound Lines, 303 U.S. 261; 82 L. Ed. 831 (1938) 38
N.L.R.B. v. Williamson-Dickie Mfg. Co., 130 Fed. (2d) 260 (5 C.C.A., 1942) 47

Packard Motor Car Company, In re, 61 N.L.R.B. 4 (1945) 25, 27, 56
Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177; 85 L. Ed. 1271 (1941) 48, 50, 52, 53
Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146; 85 L. Ed. 1251 (1941) 36

R.C.A. Manufacturing Co., In re, 2 N.L.R.B. 159 (1936) 60
Rochester and Pittsburgh Coal Co., In re, 56 N.L.R.B. 1760 (1944) 24, 45

Skidmore v. Swift & Co., 323 U.S. 134; 89 L. Ed. 124 (1944) 34
Solvay Process Co. v. N.L.R.B., 117 Fed. (2d) 83 (5 C.C.A., 1941) 40
Soss Manufacturing Co., In re, 56 N.L.R.B. 348 (1944) 24, 44

PAGE

Southern California Gas Co., In re, 10 N.L.R.B. 1123 (1939) 60

Southern Steamship Co. v. N.L.R.B., 316 U.S. 31; 86 L. Ed. 1246 (1942) 32, 46, 50, 52, 53

Southport Petroleum Co., 8 N.L.R.B. 792 (1938) ... 60

Todd-Johnson Dry Docks Co., 18 N.L.R.B. 973 (1939) 61

Union Collieries Coal Company, In re, 41 N.L.R.B. 961 (1942) 21

Union Collieries Coal Company, In re, 44 N.L.R.B. 165 (1942) 21, 24, 25, 28, 33

U. S. v. Carbone, 327 U.S. 633; 90 L. Ed. 679 (1946) 32

U. S. v. Midwest Oil Co., 236 U.S. 459; 59 L. Ed. 673 (1915) 34

U. S. v. Swift & Co., 286 U.S. 106; 76 L. Ed. 999 (1932) 15

United States Stamping Co., In re, 1 N.L.R.B. 123 (1936) 20

West Kentucky Coal Co., In re, 10 N.L.R.B. 88 (1938); 116 Fed. (2d) 816 (6 C.C.A., 1940) ... 61

Supreme Court of the United States

OCTOBER TERM, 1946

NO. 418

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

JONES & LAUGHLIN STEEL CORPORATION, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT

Official Reports of the proceeding in the Court below, and before the Board.

In this case the Court is called upon to review the decision of the Sixth Circuit Court of Appeals, reported as *N.L.R.B. v. Jones & Laughlin Steel Corporation,* 154 Fed. (2d) 932 (April 4, 1946). An earlier decision of the same case, *N.L.R.B. v. Jones & Laughlin Steel Corporation,* 146 Fed. (2d) 718 (December 8, 1944), was considered here, on the Labor Board's petition for cer-

tiorari at No. 1237 October Term, 1944; and the record was remanded for further consideration of alleged new circumstances: *N.L.R.B. v. Jones & Laughlin Steel Corporation,* 325 U.S. 838 (June 4, 1945). The Labor Board's decisions, here under review, are reported as *In re Jones & Laughlin Steel Corporation, etc.,* 49 N.L.R.B. 390 (a direction of elections issued May 3, 1943, and printed in the Transcript here at R. 52), and *In re Jones & Laughlin Steel Corporation, etc.,* 53 N.L.R.B. 1046 (a final cease and desist order dated December 2, 1943, and printed at R. 73).

COUNTER-STATEMENT OF THE QUESTION INVOLVED.

It is believed that this case presents only one question of any importance, *viz.*:

Was it the purpose of the National Labor Relations Act to provide that a single labor Union shall be entitled to command recognition as exclusive representative of the rank and file laborers in a large steelworks, and, at the same time, of the members of a small force of police who are solely responsible, to the owners of the steelworks and to the public, for the day-to-day maintenance of law and order and the enforcement of managerial authority in the Works?

COUNTER-STATEMENT OF THE CASE.

Jones & Laughlin Steel Corporation owns and operates several steel manufacturing Works. Amongst them is the Otis Works. It is a large enterprise, occupying two tracts of land located in outlying districts of Cleveland, Ohio, which have an aggregate area of almost four hundred acres (R. 5, 116).

In the operation of the Otis Works, the Steel Corporation normally employs about 4,700 individuals (R. 5). The great bulk of this force, the class of employees known as "production and maintenance workers," has been represented for the purposes of collective bargaining, since long before this proceeding began, exclusively by the labor Union now known as the "United Steelworkers of America, C.I.O." (R. 5).

Late in 1942, the Steel Corporation and the Union entered into a new contract, by which were fixed the wages and other terms of employment of the Union's constituents; *i.e.*, of the "production and maintenance workers"; and by which the Union expressly disclaimed any jurisdiction of any of the other, much smaller classes of Company officers and agents, serving in the Works, but traditionally identified with management and not with labor. The classes so disclaimed were "* * * foremen and assistant foremen * * * who qualify for exemption (as executive or administrative officers or employees) under the Fair Labor Standards Act," and "* * * *watchmen,* salaried employees and nurses." (Italics supplied; R. 5, 16).

By this reference to "watchmen", the parties to the contract meant the members of the plant police force, an armed and uniformed corps which the Company had

always maintained as an agency of the management of the Works. It was, in other words, contemplated by the Agreement that during its term, or until it should be terminated after notice by either party (see R. 32), the Union should not claim any right to represent the members of the plant police force.

In spite of this, the Union commenced, within a matter of a few weeks after the 1942 contract was signed, a campaign to "organize" the plant police as members of the rank and file steelworkers' local Union, and so to "take them under its wing" (R. 14-15). By March 15, 1943, three months after the making of the contract, the Union filed with the Labor Board the Petition for Certification, which was the first step in this case (R. 1-2).

From that time, from the outset of this case that is, the Company has opposed the Union's attempt to qualify itself as exclusive representative of the policemen, upon two principal grounds (see R. 6-8; 60, etc.): first, that the National Labor Relations Act does not contemplate compulsory recognition by employers of a union of any class of agents who are traditionally and indispensably identified with management, or with law enforcement, or both; and, secondly, that the representation of the plant policemen by the same Union which represents the rank and file labor in the Works would, under such circumstances as have existed here, tend to subvert and not to effectuate the true policies of the Act, and is, for that reason, neither contemplated, required nor permitted by the Act.

To maintain these two arguments, which are, of course, closely related in principle, the Company has referred (as has the Board) to the position, functions and duties of the plant policemen: matters which the Board has, though sometimes grudgingly, conceded to be relevant to any appraisal of their status under the National Labor Relations Act.

The Otis Works police force is a small one—at the time of the hearing it numbered only about seventy officers and patrolmen (R. 8); but its members were charged with large private and public responsibilities. They were, to state it as briefly as possible, the sole law enforcing agents normally in service on the Company's property; the sole agency legally qualified and practically available to enforce Company rules and public laws amongst the thousands of rank and file steelworkers in the Works; and the sole agency normally present, in the Works, to do any of the other duties commonly assumed by civil policemen (R. 6, etc.; 115-117).

During a critical period of the late War, from August 5, 1942 until May 29, 1944, the plant policemen were all sworn and enrolled members of the Auxiliary Military Police Force, created by Executive Order No. 8972 (6 Fed. Reg. 6420) as an adjunct of the Army (R. 114; 6, etc.). At all other times, and since a period long before the War, the plant policemen have all been commissioned, sworn and bonded as private policemen of the City of Cleveland (R. 115). As such, they are public peace officers of the State of Ohio (R. 121); and as a practical matter the other public authorities have always delegated wholly to them the tasks of providing police protection in the Otis Works, and of preserving peace, law and good order there (R. 116). In addition, they

discharge certain duties as confidential agents of management; undertaking such things as the handling of pay rolls and the investigation of accidents, trespasses and violations of Company rules (R. 6; 116-117). They are, in short, under all normal conditions the ultimate efficient arm of the will of management and of the public in the enforcement of law and legal rights in the Otis Works.

As is not uncommon in such cases, the salaries or wages of the plant policemen are paid by the Company; their duties and work assignments have been (within the limits permitted by law and by the civil and military authorities) directed by a Company official known as the Director of Plant Security; and they have been subject (within the same limits) to discipline or discharge at the instance of the Company. They had never, prior to the commencement of this case, been sought or claimed as the constituents of any labor union (R. 8-11, etc.).

After an investigation of the facts asserted by the Union's petition, which was conducted under Section 9 of the Act and which included a hearing (R. 2, etc.), a "Decision and Direction of Election" (R. 52-55; 49 N.L.R.B. 390) and an election of the policemen (R. 33), the Board issued a "Certification of Representatives," dated and published June 5, 1943, by which it certified that in the election, duly conducted, the Union had been designated by a vote of 37 to 15, as the exclusive representative of all of the policemen for the purposes of collective bargaining under the Act (R. 34).

Immediately after the election, the Union's District Director requested of the Company that it open the

negotiation of an agreement with the Union, as exclusive representative of the policemen (R. 55). The Company's reply declined to accord the Union any such recognition (R. 56); and on August 13, 1943, the Union filed a Charge under Section 10 of the Act, by which it asserted that this denial of recognition was in violation of Sections 8 (1) and 8 (5) of the Act (R. 58).

About a month later, on September 16th, the Board issued a Complaint based on the Union's Charge (R. 35); and on September 28, 1943, it conducted a second hearing in the case. At this hearing the Company offered, as a statement intended to "clarify Respondent's present position in respect to bargaining with units composed of plant guards" (R. 50), a document addressed to the Labor Board which declared clearly one of the legal objections it relies upon here: that "the Petitioner is the same labor organization that represents production and maintenance employees in all of its steel plants." Its reliance upon its other principal objection: the related contention that plant guards are supervisors, and on that account exempt from union jurisdiction, was shown in the Board's own case (R. 56). Both objections had been raised months before, in a brief filed with the Board after its first hearing, at the outset of the case (see R. 52, 126), but not included in the Transcript here.

On December 2, 1943, after conducting the further proceedings contemplated by the Act and its rules, the Board handed down a final cease and desist order, mentioned in the opening paragraph of this brief, by which it commanded the Company to recognize the Union as exclusive representative of the Otis Works police force (R. 73). And on February 1, 1944, the Board filed in the Circuit Court below its petition for the enforcement

of its final cease and desist order, and so submitted to judicial review its own contentions, and the counter-contentions of the Company, concerning the status of the plant policemen under the Act.

In *N.L.R.B. v. Jones & Laughlin Steel Corporation*, 146 Fed. (2d) 718 (December 8, 1944), the Circuit Court set the Board's final order aside, basing its decision solely upon the evidence received at the Board's hearings and included in the Board's transcript. The Court's opinion (R. 83-89), held that the obligations of the policemen to deal with the rank and file steelworkers as agents of management and as auxiliary military police were so completely incompatible with those they must assume as the members of the rank and file union, as to make improper any compulsory recognition of the Union (R. 88-89).

The Board shortly filed a long petition for rehearing (R. 89-111). In one of a number of footnotes, it stated (though not as a matter of any particular importance) that it had been informed that the Steel Corporation's police force had recently been demilitarized (R. 93), so that the Otis Works policemen were no longer Auxiliary Military Police. On February 6, 1945, the Circuit Court denied the petition for rehearing, in an order which made no reference to the new fact of demilitarization, so alleged. The new fact was stated again, much more prominently, in the Board's petition for certiorari filed here at No. 1237 October Term, 1944; and, as a result, this Court's order in that proceeding vacated the decision of the Circuit Court, and remanded the case to it for further consideration of the alleged changed circumstances: 325 U.S. 838 (June 4, 1945).

After the remand, seeking some regular way to place the current situation of the plant police of record in the Circuit Court, the Board sought (rather insistently, as is shown by its correspondence, printed in the appendix to this brief) a stipulation of the new facts, and such a stipulation (R. 114) was made and filed by the Board in the Circuit Court, as an annex to, and the principal basis for, the Board's motion for a decree enforcing its order (R. 112). The Board's motion was opposed by the Company, and the case was argued again before the Circuit Court (R. 118). On April 4, 1946, the Circuit Court handed down its decision, since reported as *N.L.R.B. v. Jones & Laughlin Steel Corporation*, 154 Fed. (2d) 932. In this decision, the Court considered the new facts set out in the stipulation, presented as aforesaid by the Board (expressly rejecting the Company's objection to the use of ar evidence *dehors* the Board's transcript: R. 120), but i held the Company's other contentions by adhering to its original view of the law, and holding that, under the Act, the Board's order must be denied enforcement (R. 121, 122).

It is this decision which is now presented here for review.

SUMMARY OF ARGUMENT.

I. To decide the important question presented here, it is unnecessary to determine whether the Court below should have decided the case upon the record made before the Board alone, without considering the additional facts stipulated and laid before it by the Board.

1. The Board's criticisms of the Circuit Court's procedure are wholly untenable, both in fact and in law.

2. And at all events, the question of procedure raised by the Board is of no controlling importance in the case.

II. Under the National Labor Relations Act, the Labor Board cannot command that a Union, which is qualified as exclusive representative of the rank and file steelworkers in a large steelworks, shall be recognized at the same time as exclusive representative of plant police who represent management and the public in the exercise of control over the rank and file.

1. The Board has, until very recently, recognized its duties, under the Act, to limit union organization at the line between labor and management, and to forbid the representation of agents of management by rank and file unions.

2. The new rule of law, recently established by the Board and presented here, differs from the new rule presented for consideration by the *Packard Motor Car Co.* case, now under advisement by the Court.

3. By its reliance upon a literal reading of the Act, to support a wholly new interpretation, the Board has ignored the applicable canons of statutory interpretation.

(a) The canon preferring a reasonable over a literal construction.

(b) The canon which had given an almost conclusive presumption of correctness to the Board's own long established, contrary interpretation.

4. The Board's new rule, abolishing the line between non-union management and union labor, would subvert instead of effectuate the policies of the Act.

(a) This is a test of the validity of every order of the Board.

(b) The Board's new rule would violate the purpose of the Act to maintain the freedom of rank and file unions from any influence by representatives of management.

(c) The Board's new rule would violate the purpose of the Act to avoid any unnecessary impairment of the functions of management.

(d) The Board's new rule, if applied to the military or municipal police who figure in this case, would violate the purpose of the Act to avoid any infringement of the public interest in the preservation of law and order.

5. In the separation of non-union management and union labor contemplated by the Act, the police involved here must be classified as agents of management.

6. The status of policemen under the Act is not affected by the inconclusive experiences described in the Board's brief.

7. The status of the policemen who are involved in this case is not affected by their "demilitarization."

III. Since it interprets the Act and applies it correctly, the decree of the Court below should be affirmed.

ARGUMENT.

I. To decide the important question presented here, it is unnecessary to determine whether the Court below should have decided the case upon the record made before the Board alone, without considering the additional facts stipulated and laid before it by the Board.

1. *The Board's criticisms of the Circuit Court's procedure are wholly untenable, both in fact and in law.*

In the brief for the Labor Board (or at least in the printer's proof of that brief which has been served on the respondent), the Board devotes much attention to the proposition that the Court below should not have given any consideration to the stipulation filed with it by the Board on February 4, 1946.

By that stipulation (R. 114-117), the parties agreed that the Circuit Court might accept as facts a number of things, from which the following might be concluded: that the Otis Works plant police were enrolled as auxil-

iary military police on August 5, 1942; that they were demilitarized on May 29, 1944, or several months before the first of the two arguments in the Circuit Court; that, at all times since their demilitarization they had been sworn and enrolled as members of the police force of the City of Cleveland, and the only agents of that force doing duty in the Works; and that they had, since their demilitarization, been responsible for a wide variety of tasks which involved both the preservation of the Steel Corporation's interests as against those of rank and file steelworkers, and the preservation of the public interests in law enforcement, peace and order.

It seems to be the Board's contention that, although all these things are true, and although it deliberately laid them before the Court, and induced the Court to consider them against the objections of the Steel Corporation (R. 120), the Circuit Court should have ignored everything in the stipulation, except the bare fact of demilitarization; and that its consideration of the other facts, and particularly of the fact that since demilitarization the police had been State peace officers, was an error which requires a reversal.

This contention is clearly forbidden the Board by the rule, as old and well-established as any rule of appellate practice, that a party who induces or contributes to an error in a subordinate Court, cannot later be heard to complain of the error in an appellate Court:

Memphis v. U. S., 97 U.S. 293 (1878);
Law v. U. S., 266 U.S. 494 (1925);
Mercelis v. Wilson, 235 U.S. 579 (1915).

Apparently in an attempt to avoid the force of this rule of estoppel, the Board contends that the status of the Otis Works policemen as municipal police of the City of Cleveland should have been called to the Board's attention at its hearings of April 8, 1943 (R. 2) and September 28, 1943 (R. 41). No such contention was advanced in the Circuit Court, until after it had handed down its second decision of the case—that now under review. The argument is evidently an afterthought.

In order to make it, the Board seeks to find in the record, by an inconsistent and anomalous use of the stipulation itself, evidence that the municipal police status of the Otis Works policemen existed in 1943. But that is not the fact, and no such fact is asserted in the stipulation or elsewhere in the record. The facts are known to the policemen and the Union, and by this time they should be known to the Board.

For years before August 5, 1942, the Otis Works policemen held commissions as members of the municipal force in Cleveland. During the period of their enrollments as auxiliary military police, from about August 5, 1942, throughout 1943 when this case was pending before the Board, and until the demilitarization of May 29, 1944, although they continued to do the work of peace officers (R. 6; 117), their municipal commissions were withdrawn. In the order of demilitarization it was made clear that this change of their military status was intended to work no change in the duties of the plant police (R. 117-118); and in keeping with this sugges-

tion and the Company's own policy of many years, the Cleveland city police commissions were thereupon revived, as described accurately in the stipulation (R. 115-116). In short, as the municipal police status did not exist in 1943, the Company could not have shown (and it was not called upon to speculate), at hearings held in 1943, that it might be revived in 1944.

The real question to be considered concerning the use of the stipulation, while the case was pending in the Circuit Court, was that raised by the Steel Corporation, under the rule in *N.L.R.B. v. Newport News Shipbuilding Company,* 308 U.S. 241 (1939)—the question whether, in such a case, the reviewing Courts may consider any fact not disclosed in the Board's transcript. If the new fact of demilitarization was, subject to this rule, entitled to any consideration by the Circuit Court, it was only because, under the rule of such cases as *U.S. v. Swift & Co.,* 286 U.S. 106 (1932), a federal appellate Court—or any Court of equity—has the power to adjust or adapt its disposition of any particular case to meet changing or changed conditions.

This rule undoubtedly applies to enable the Circuit Courts of Appeals to enter proper decisions in review proceedings under the National Labor Relations Act; in cases, for example, in which a Board order, valid when made, has been made invalid, or useless, or wholly inequitable, by circumstances arising later:

Indiana Quartered Oak Co. v. F.T.C., 58 Fed. (2d) 182 (2 C.C.A., 1932);

Century Metalcraft Co. v. F.T.C., 112 Fed. (2d) 443 (7 C.C.A., 1940).

It is gravely doubtful, however, that, even were the facts as the Board supposes in its brief, the Board could maintain the converse proposition upon which it must rely here: the proposition that an employer, erroneously found guilty of an unfair labor practice by an invalid order of the Labor Board, based upon insufficient evidence, can be held guilty and commanded to obey the order by a Circuit Court, in reliance upon the Court's knowledge of new facts which appear to establish his guilt. It is submitted that this proposition is condemned by the principle of *N.L.R.B. v. Newport News Shipbuilding Company, supra;* and that, under such circumstances, the Board must seek a remand of the case, hold a new hearing, and so give the respondent employer his constitutional opportunity to answer or explain the newly-alleged facts.

And at all events, if the Board had the right to lay any new, relevant fact before the Circuit Court, then the Court was entitled to know also the related relevant facts. If the fact of demilitarization was open to consideration, the Circuit Court was entitled to know and to consider, as it did, what status was assumed by the Otis Works policemen after their demilitarization. It was not required, by any rule of law, to suppose, quite erroneously (R. 118), that upon the termination of their military status the Otis Works policemen ceased to occupy positions of any importance to the Steel Corporation's security, or to that of the public. It was not bound, that is, to decide the case finally in ignorance of the facts, and in blindness to the interests of the parties. It is fair to observe that the Board recognized this, when it made a stipulation disclosing all the facts, and laid it before the Circuit Court.

2. *And at all events, the question of procedure raised by the Board is of no controlling importance in the case.*

If the two decisions of this case by the Circuit Court be read together, it will be perceived that in its view of the law the status of the policemen under the National Labor Relations Act was not controlled by the fact that they were or were not auxiliary military police. Instead, both decisions were controlled by the Court's conclusion that, under the Act, no single labor union can be qualified to command recognition as exclusive representative of both the rank and file laborers in a large steelworks, and also of a class of individuals (whatever be their military or municipal or other official status) who are necessarily relied upon by management and the public to enforce company rules and public laws, *inter alia* against the rank and file.

This principle, so accepted by the Court below, rested upon its interpretation of the scope of the Labor Board's powers and responsibilities under the Act. If the Court's interpretation was right (a proposition shortly to be argued in this brief), it applies with the same force to non-military municipal policemen as to auxiliary military policemen. It applies, for that matter, to the members of any class of individuals who do work and discharge functions which are similar to those of the Otis Works police in these two respects: that they are functions which must be discharged if the enterprise is to operate, and that they must involve the exercise of managerial authority or public authority, in proper cases, over the rank and file who control the union. And if the Court's interpretation was wrong, it is equally

wrong in its applications to military and non-military police, or to Company officers or foremen or any other agents of management. From all these things (and in the peculiar circumstances of the whole matter), it must follow that the case neither requires nor calls for a decision of the questions of practice, procedure and jurisdiction raised by the Board's brief.

II. Under the National Labor Relations Act, the Labor Board cannot command that a Union, which is qualified as exclusive representative of the rank and file steelworkers in a large steelworks, shall be recognized at the same time as exclusive representative of plant police who represent management and the public in the exercise of control over the rank and file.

1. *The Board has, until very recently, recognized its duties, under the Act, to limit union organization at the line between labor and management, and to forbid the representation of agents of management by rank and file unions.*

At the present time, no question arising under the National Labor Relations Act appears to call more pointedly for wise settlement than does the question raised by this case: To what extent does the Act provide for the compulsory recognition by employers, of labor unions which desire to represent industrial policemen, or foremen, or other agents of management?

This question is presented in another case, argued before this Court during the present term, but not yet decided: *Packard Motor Car Co. v. N.L.R.B.* It is involved in numerous other cases now pending in the lower Courts, and before the Labor Board, and it has been the

subject of the most exhaustive consideration and study, during the present session of Congress, in the Houses of that body and elsewhere.

It is a question which did not exist, in any material way, when the National Labor Relations Act became law, or for years thereafter. In the wave of union organization which was encouraged by the Act, it was taken for granted by employers, by working people and by union leaders, that "labor" was one thing and "management" another; and that every true labor union must exclude representatives of management from its membership, from any part whatever in its internal affairs, and from all of its other functions: it was taken for granted, in other words, that management's contacts with union labor should be at arm's length.

From 1935 until about 1941, in case after case, the Board accepted this view, and in its descriptions of "appropriate units" in election cases, carefully drew the line so as to include within union jurisdiction only the classes of employees traditionally regarded as "labor," and to exclude all persons who were recognized to be representatives of management in its dealings with labor.

This general assumption, during a period of years after 1935, that the Act contemplated the preservation of a line between union labor and non-union management, is significant now because it explains the omission from the Act of any language specifically adapted to settle such questions as that presented here. If, as the historical facts show, everybody concerned in the matter in 1935 knew or thought he knew the boundaries between union labor and non-union management, it is not surprising that Congress saw no reason to define them.

In its Second Annual Report to Congress and the President, that for the fiscal year ended June 30, 1937, the Board showed that, from its beginnings (in the case of the *United States Stamping Co.*, 1 N.L.R.B. 123 (1936)), it had taken for granted the necessity that all regular representatives of management, in its dealings with the rank and file of labor, must be excluded from the jurisdiction of rank and file unions. The Board said (p. 136):

> "The exclusion of supervisory employees from bargaining units composed of ordinary employees is based on their connection with the management, with which collective bargaining is to take place. The extent to which foremen and subforemen come within this rationale is often the subject of dispute. The criteria which have been used by the Board in deciding issues of this kind may be seen in two cases involving subforemen. In *Matter of R. C. A. Manufacturing Company, Inc.*, it was agreed by all of the parties that foremen should be excluded from the appropriate unit, but one of the participating unions contended for the exclusion also of certain working group leaders. The Board said:
>
> > 'These working group leaders, who may on occasion actually work on materials, possess authority to give orders to the employees under their supervision and to recommend disciplinary action to the foremen or assistant foremen. They are therefore to be considered as part of the supervisory force.'
>
> "In *Johns-Manville Products Corporation and Asbestos Workers' Union, Nashua Local, Affiliated with the Committee for Industrial Organization, The Independent Asbestos Workers' Association,*

and the American Federation of Labor, a similar situation was presented as to assistant foremen. The Board included them in the appropriate unit, saying:

> "It appears, however, that these employees have no right to hire or discharge and ordinarily are engaged directly on production. Their only distinguishing function is that they temporarily replace absent foremen. We think that their interests are closer to those of the ordinary, than to those of the supervisory, employees.'

"It is clear that the power to hire and discharge is not the sole criterion of what constitutes a supervisory employee. In *Matter of Consumers' Research, Inc.*, the Board excluded from an appropriate unit the personnel director of the respondent, 'who, despite her position, was not the final arbiter in the matter of tenure of employment.' The Board said:

> 'A personnel director is, *ipso facto*, intimately connected with management, and in a position to affect employment policies.' "

This view of the status, under the Act, of those in the management side of the labor-management line was reiterated in case after case (and in Annual Report after Annual Report) without modification until 1942. During that year, in the case of *Union Collieries Coal Company*, 41 N.L.R.B. 961 (June 15, 1942) and 44 N.L.R.B. 165 (September 18, 1942), the Board held that a union admitting to membership only supervisors, might be certified as exclusive representative of a group of such supervisors. This decision, however, signified no real change in the original rule; for it was, as the

Board made clear, controlled, *inter alia*, by the apparent independence of the union from any connection with any rank and file organization. The Board said (44 N.L.R.B. p. 169):

> "Our conclusion that the supervisory personnel involved in these proceedings are within the protection of the Act does not, of course, mean that an appropriate unit for collective bargaining purposes may include both supervisors and their subordinates. The Statute, (Sec. 9 (b)) expressly delegates to the Board the discretion to decide 'in each case' the unit appropriate for collective bargaining. In this case the supervisory personnel have formed and joined an independent union, unaffiliated with any parent organization."

The *Union Collieries* decision was never made effective: the "independent union" was shortly absorbed into the United Mine Workers of America; no effort was made by that organization to enforce acceptance of the Board's interlocutory findings; and no final order was ever made in the case. Instead, in less than a year, the Board overruled its own new doctrine, and reverted to its view that no labor union can, by the procedures provided by the Act, command recognition as exclusive representative of any group of representatives of management.

This was effected in the case of the *Maryland Drydock Company*, 49 N.L.R.B. 733 (May 11, 1943). The Board refused to permit the qualification of a rank and file union as representative of "lead men" and others, of the lowest grade of supervisors in a shipyard. The Board held (p. 740):

"The very nature of a foreman's duties make him an instrumentality of management in dealing with labor. The duty of supervision with which he is principally charged implies a delegation of authority with respect to the selection, promotion, and discharge of the workers in his section. Although the delegation of authority is no longer plenary in modern factories which have a central personnel system, there is no doubt that even the function of advising or recommending action with regard to personnel is sufficient to command respect and instill fear in the minds of subordinates. To hold that the National Labor Relations Act contemplated the representation of supervisory employees by the same organizations which might represent the subordinates would be to view the statute as repudiating the historic prohibition of the common law against fiduciaries serving conflicting interests.

(p. 741):

"The legislative history of the National Labor Relations Act indicates that the conditions which prevailed in the mass production industries were the primary factors which led to its enactment. In these industries it was traditionally recognized by all parties that the interests of foremen lay predominantly with the management groups. We are of the opinion in the present stage of industrial administration and employee self-organization, the establishment of bargaining units composed of supervisors exercising substantial managerial authority will impede the processes of collective bargaining, disrupt established managerial and production techniques, and militate against effectuation of the policies of the Act. To the extent that our

decisions in the *Union Collieries, Godchaux Sugar,* and subsequent cases are inconsistent with this opinion, they are hereby overruled. We accordingly find that the units herein proposed are not appropriate units for collective bargaining within the meaning of Section 9 (b) of the Act and we shall therefore dismiss the petition."

The Board took occasion to explain that it had determined to overrule the *Union Collieries* case, and to show that the supposed principle of that case was not a sound one: that nothing is to be accomplished in such cases by grouping, or attempting or pretending to group, the managerial agents in a "separate unit" from that of the rank and file, saying (p. 741):

"* * * Even in our earlier cases, the Board recognized the danger inherent in the organization of supervisors, and sought to protect the ordinary employees by refusing to sanction the establishment of bargaining units containing both supervisors and their subordinates. We are not convinced, however, that this measure affords adequate protection of the rights of the vast bulk of employees, whom the Act was specifically designed to protect. For, although supervisors may nominally constitute a separate bargaining unit, it is clear that they may—as they did in the case at bar—affiliate with and designate as their representative the same union which represents their subordinates."

Through 1944 the doctrine of the *Maryland Drydock Company* case—the traditional doctrine of all the cases from 1935 through 1941—was not shaken. See: *In re Soss Manufacturing Co.*, 56 N.L.R.B. 348 (May 8, 1944) and *In re Rochester etc. Coal Co.*, 56 N.L.R.B. 1760

(June 29, 1944). In the case of the *Packard Motor Car Co.*, 61 N.L.R.B. 4 (March 26, 1945), however, the Board changed its view again, and, as in the *Union Collieries* case, held that an independent union, devoid of any connection with the rank and file, could qualify as exclusive representative of certain foremen in an automobile manufactory; and then, on March 7, 1946, in another case, involving the coal mine supervisors of *Jones & Laughlin Steel Corporation*, 66 N.L.R.B. 386, broadened the new rule tremendously, by holding that a rank and file union, the United Mine Workers of America, may be qualified to represent the supervisors serving in union shop mines, regardless of the extent of the supervisors' responsibilities as agents of management.

Neither of these two decisions has become effective, or has, thus far, settled the law. The *Packard Motor Car Company* decision is now under review here, as is stated above; and the Board's final order in the *Jones & Laughlin Steel Corporation's* mine supervisors' case, entered on December 30, 1946, is under review in the Third Circuit Court of Appeals. In both cases, one member of the Board dissented strongly against each of its opinions. In the *Jones & Laughlin* case, the Board recognized the difficulty of its new rule, but declared its conclusion that, since the Act contains no words specifically empowering it to do so, it cannot (in cases involving the foreman question, at least) limit or deny the right of any individual in industry to be represented by any union he chooses, or the right of any union to extend its jurisdiction, under the Act, to cover any "unit" in which it is able to win a majority of the eligible voters (66 N.L.R.B. p. 398):

> "The Board has already found that these foremen are 'employees' within the meaning of the Act.

(Section III, *supra*, and cases cited therein.) We think that this is largely dispositive of this case. The Act contains no specific language empowering the Board to disqualify a freely chosen, legitimate labor organization, not company dominated, as the collective bargaining representative of persons already found to be 'employees' within the meaning of the Act.

(p. 399):

"The Act guarantees to all employees the right to bargain collectively 'through representatives *of their own choosing.*' Unless, therefore, certification of a bargaining representative freely selected by a given group of employees in an appropriate unit would be contrary to the policy of the Act, this Board cannot and should not refuse to honor the employees' choice. That policy appears in the preamble: 'It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining* and by protecting the exercise by workers of full freedom of association, self-organization, and *designation of representatives of their own choosing,* for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.' (Emphasis supplied.)"

In the same opinion, the Board suggested that, should its new rule seem offensive to the underlying policies of the Act, in its effects upon industry and upon labor unions, the remedy must be in Congress, if the Board's

new interpretation of the Act is otherwise correct; or, of course, in the Courts, if the new rule be incorrect:

(p. 403):

"The Board reaches this conclusion with full realization of the difficulty and the importance of the policy considerations involved. We conclude, despite the weight that should be attached to the arguments—some real and some speculative—adduced in favor of our refusing to apply the Act to these employees, that it would be an abuse of discretion for us to follow that course. The Act, as written today, requires that we protect the right of employees to bargain collectively through representatives of their choosing, not of our choosing. So long as the Congress of the United States imposes no limitation upon their choice, it is not for us to do so."

2. *The new rule of law, recently established by the Board and presented here, differs from the new rule presented for consideration by the Packard Motor Car Co. case; now under advisement by the Court.*

It is to be observed that in the Board's decision of the *Packard Motor Car Company* case, now under review by this Court, the Board held: (1) that under Section 7 of the Act, all "employees" have the rights to "form, join or assist labor organizations," and "to bargain collectively through representatives"; (2) that the term "employee" is given a definition in Section 2 (3) of the Act which includes foremen—and also all other individuals representing management, including corporate officers and directors; and (3) that it must

follow that, under the Act, foremen, as "employees", have a legally enforceable right to bargain through unions, provided only that the unions chosen by the foremen are not those which represent their rank and file subordinates. By this new rule, the Board abandoned much of the reasoning set out in its opinion in the *Maryland Drydock Co.* case, and perhaps overruled that decision in part—though only to the extent that it had overruled the *Union Collieries* case. But this left the rule of the *Maryland Drydock Company* case—that of the Board's earliest cases, described in the Second Annual Report, largely intact, in a formal if not a practical sense, because it did not abolish the principle that no rank and file union can qualify to represent foremen or other agents of management.

In the *Jones & Laughlin* coal mine case, however, the Board carried its new belief in the literal interpretation of Sections 2 and 7 of the Act much further, and pushed the new doctrine to an extreme new limit, by holding that (1) under Section 7 all "employees" have the rights to form, join, assist or bargain through representatives "of their own choosing"; (2) that under a literal reading of Section 2 (2) (as has been observed) every paid representative of management is an "employee"; and (3) that it must follow from (1) and (2) that every foreman, or policeman or corporate officer or other paid agent of any employer has rights under the Act, which the Board cannot deny but which it must on the contrary enforce, to form, join and assist any labor organization he chooses, and to be represented by any union he, and a majority of the others in an "appropriate unit" may choose, no matter what its other relationships and responsibilities to rank and file labor may be. By this step, the Board abandoned every pre-

existing limitation upon the scope of union jurisdiction, and overruled not only the *Maryland Drydock Co.* case, but all of its other earlier cases and doctrines. The resulting rule is so new, and so different from anything which went before, that this present case has become, in this Court, a case of first impression.

It will be seen that the basic question here is not the same which has been presented in the *Packard* case. In *N.L.R.B. v. Packard Motor Car Co.*, 157 Fed. (2d) 80 (August 12, 1946), the decision under review in this Court, the Sixth Circuit Court of Appeals outlined the distinction. It upheld the Board's order only because the Union certified as representative of the Packard Company's foremen was (so the Board had found) wholly independent of the Union or Unions representing the Packard rank and file. Referring to its two earlier decisions which this present brief is intended to sustain, the Circuit Court said (157 Fed. (2d) 86):

> "Since the union involved is independent and neither a part of nor controlled by the union representing the production workers, we also uphold the decision as to the propriety of the exclusive bargaining representative named by the Board. This is a situation diametrically opposite to that presented in Jones & Laughlin Steel Corp. v. National Labor Relations Board, supra, where the bargaining agent designated was the identical union which represented the production workers. As found by the panel of the War Labor Board, it is not appropriate for supervisors 'who are responsible for discipline, assignment of work, rate adjustments and promotions, who represent the employers in handling grievances of rank and file

workers, and who generally represent higher management in dealing with the rank and file workers, to be subject to discipline by a union which is controlled directly or indirectly by the men whom they supervise. The effectiveness of management requires that it have its own uncontrolled agents to represent it in dealing with the rank and file, just as the rank and file are entitled to have their own uncontrolled representatives for dealing with higher management.'

"So far as the present designation is concerned, it leaves the foremen uncontrolled agents in dealing with the rank and file, and no reason appears to anticipate that the independence of the Foreman's Association of America will in the immediate future be destroyed."

3. *By its reliance upon a literal reading of the Act, to support a wholly new interpretation, the Board has ignored the applicable canons of statutory interpretation.*

(a) THE CANON PREFERRING A REASONABLE OVER A LITERAL CONSTRUCTION.

It is a rule of statutory construction, applicable to all general statutes and with particular force to such remedial acts as the National Labor Relations Act, that the judicial, executive or administrative authority who puts a statute into effect must always interpret it as a whole, and in such manner as to accomplish its purpose, and that he must never adopt a literal reading of some phrase or section, if such a reading will produce a result which is not in accord with the general pur-

pose, or which is for any other reason unreasonable or iniquitous.

Church of the Holy Trinity v. U. S., 143 U.S. 457 (1892) is the leading case. This Court held that the Act forbidding any alien to enter the United States for the purpose of performing a contract to furnish labor or service of any kind, could not be applied to condemn the entry of an alien minister of the Gospel, who had contracted to serve as such in a New York church. The Court said (p. 458):

> "It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. * * * While there is great force in this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

Within a little more than a year past, *Church of the Holy Trinity v. U. S.* has been cited by this Court at least twice, as an illustration of the proper method of interpretation of federal statutes:

Markham v. Cabell, 326 U.S. 404 (1945) and
U. S. v. Carbone, 327 U.S. 633 (1946).

Perhaps a hundred other decisions of this Court could be cited, as authorities similarly condemning the method of literal reading as a means of interpreting written laws. A literal reading is never correct, if it produces an absurd or apparently unforeseen and undesired result. The Labor Board's literal readings of the Act, in other connections, have often been condemned; for example, in:

N.L.R.B. v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939); and
Southern Steamship Co. v. N.L.R.B., 316 U.S. 31 (1942).

And yet, it was only by a literal reading of Sections 2 and 7 of the National Labor Relations Act that the Board reached its conclusion, explained in the *Jones & Laughlin Steel Corporation's* coal mine case, that it must accord to rank and file unions an enforceable legal right to represent the supervisors of the rank and file. The Board's conclusion could have been reached in no other way. It had no historical background to recommend it. That its application might involve consequences not foreseen by Congress, wholly undesirable in general, and likely, in particular, to defeat important purposes of the Act, are matters shortly to be argued, and which the Board conceded. But the Board gave no consideration to the effect of these circumstances, as a matter of law,

to forbid its literal interpretation or to cast doubt upon the soundness of its new rule. Instead, it seems, it simply ignored the established canon.

(b) THE CANON WHICH HAD GIVEN AN ALMOST CONCLUSIVE PRESUMPTION OF CORRECTNESS TO THE BOARD'S OWN LONG ESTABLISHED, CONTRARY INTERPRETATION.

The Board's opinion in the *Maryland Drydock Co.* case is important here. It sets forth fully the reasoning which supported the Board's original rule, the rule which held that the Act does not contemplate nor permit the compulsory recognition of any one labor union as the exclusive representative of both rank and file laborers and their supervisors. It did not, however, make any change in the Board's previous holding on that point of law. Instead, as has been observed, it merely applied a rule which had been adopted by the common consent of all concerned when the Act was passed; carefully considered and reaffirmed from year to year thereafter, in the Board's decisions and in its Annual Reports, made to Congress under Section 3 of the Act; and upheld and applied on those occasions in which any litigant before the Board had questioned it. The only doubtful point of the rule, during a period of more than ten years, before and after the *Maryland Drydock Co.* case and prior to the Board's latest decisions, was that involved in the *Union Collieries* case and the *Packard Motor Car Company* case, concerning the power of a union unaffiliated with the rank and file to represent supervisors and other managerial agents.

In the decisions by which it attempts to establish the new rule, that any rank and file union may be qualified under the Act to represent any group of supervisory

officials, the Board has given no weight to the legal consequences of its long adherence to the original rule. But the history of the original rule cannot properly be ignored in this manner. Instead, under a well-known canon, the construction placed upon the Act in the beginning by the Board; almost always accepted, during a period of many years, by labor and industry alike; successfully defended on those occasions when it was subjected to attack in litigation before the Board; and explicitly described and explained to Congress in the Board's Annual Reports, is almost certainly a correct construction. It is under no circumstances to be disturbed unless, at last, it is shown to have been the result of plain error. It is "entitled to great weight and will be rejected only in cases of apparent error":

Davis v. Department of Labor, 317 U.S. 249, 256-7 (1942); and see

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

The effect of this canon of construction is greatly strengthened where Congress has been informed, as it was here, by the Board's Annual Reports and by the almost continual discussion of this Act, of the meaning which has been attributed to its language. In these circumstances, it must be, and always is presumed that had the Board's original estimates of its own powers and the limits of union jurisdiction under the Act been wrong, Congress would have corrected the errors by amending the Act long before 1945 or 1946, when the Board changed its view of the meaning of the Act.

U. S. v. Midwest Oil Company, 236 U.S. 459 (1915) is one of many cases establishing that proposition. Over many years, the Presidents by Executive Orders

"withdrew" from the tracts of public lands, made available by various Acts of Congress for settlement by private owners at nominal cost, those portions believed necessary for other, more important public uses. This practice was made known to Congress by a Presidential report, in 1902. In 1910, certain individuals claimed a tract of oil land which they had occupied and developed under authority of an Act of Congress passed in 1897, but in disregard of an Executive "withdrawal" which had occurred several months before. Their title was held bad: Congressional acquiescence in the Presidents' practice supplied the absence of any express grant of the power to "withdraw," in the Act of 1897 or otherwise (p. 481):

> "* * * Congress, with notice of this practice and of this claim of authority, received the report. Neither at that session nor afterwards did it ever repudiate the action taken or the power claimed. Its silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress."

The parallels with this case are obvious. Congress had repeated notices of the Labor Board's assumption, from 1935 until 1946, of the existence of its power and duty, under the Act, to draw the line between union labor and non-union management, and to forbid the representation of the agents of management by labor unions qualified to represent the members of the rank and file of labor. Congress never repudiated the action taken by the Board, nor questioned the power claimed by the Board. The doctrine of Congressional acquiescence clearly applied, under the legal canon of con-

struction; and yet the Board, instead of applying it, has ignored it, as it did the other canon which has been considered.

4. *The Board's new rule, abolishing the line between non-union management and union labor, would subvert instead of effectuate the policies of the Act.*

(a) THIS IS A TEST OF THE VALIDITY OF EVERY ORDER OF THE BOARD.

Under Sections 9 (b) and 10 (c) of the National Labor Relations Act, every decision of the Board in an election or "representation" case, and every final order of the Board in an "unfair labor practice" case, must, if it is to be valid, be reasonably calculated to "effectuate the polices of the Act."

This test of the validity of the Board's "Certifications of Representatives" in election cases arising under Section 9 was recognized by the Court in *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, p. 165 (1941). As the principal test to be applied to cases arising under Section 8 of the Act, and to the Board's final orders, made in such cases under Section 10 (c), it is established by the express words of the latter section, and has been so recognized in every case in which the question has arisen. The Board is not required to prosecute every charge of unfair labor practices which is laid before it. When it does choose to prosecute, it is not, it seems, required to enter any final order. But when it does enter a final order in any such case, its order must be such that its execution by the parties will tend to accomplish the purposes of the Act; if otherwise, the order is invalid and unenforceable.

This rule is illustrated by the decisions of the lower Courts in this case and the companion *Atkins* case (*N.L.R.B. v. E. C. Atkins & Co.*, 147 Fed. (2d) 730 (1945) and 155 Fed. (2d) 567 (1946)), and in substantially every case in which this (or any other Federal Court) has set aside any final order of the Board. The Board will not deny its existence or validity.

(b) THE BOARD'S NEW RULE WOULD VIOLATE THE PURPOSE OF THE ACT TO MAINTAIN THE FREEDOM OF RANK AND FILE UNIONS FROM ANY INFLUENCE BY REPRESENTATIVES OF MANAGEMENT.

By its process of literal interpretation of the Act, which has been described, the Board reached the conclusion that every "employee," including every foreman, policeman or other representative of management, has been guaranteed the rights, which the Board cannot deny, to "form, join or assist labor organizations" and to bargain through any labor organization, "of his own choosing."

This conclusion is indispensable to every argument advanced by the Board in support of its new rule—it is, indeed, an explicit statement of one of the two phases of the new rule. But it will be shown an absurdly incorrect conclusion, if its logical results be analyzed, and tested by the rule that every valid Board order must tend to effectuate the purposes of the Act.

It has long been settled, directly to the contrary of the conclusion embodied in the Board's new rule, that the purposes of the Act require that those who represent management in its dealings with labor shall be *denied* any right to form, join or assist any labor union

which either represents or may at any future time represent, or claim to represent, any group of their subordinates in the rank and file. Every such representative of an employer, whatever his rank or position, is himself the "employer" under the definition contained in Section 2 (2) of the Act, and as such he is, again contrary to the Board's conclusion, *forbidden,* by Section 8 (2):

> "* * * to dominate or interfere with the formation or administration of any labor organization, or contribute financial or other support to it."

That this result, the opposite of the enlistment in unions of foremen, policemen and others exercising the authority of management, was one of the principal purposes of the Act, is a view which has been entertained from the beginning by this Court, and long since recognized by every subordinate authority. This point was settled here in

N.L.R.B. v. Pennsylvania Greyhound Lines, 303 U.S. 261 (1938). In that case, the supervisory representatives of the respondent employer had, the Board found, taken active parts in the formation prior to 1935, and in the administration later, of an Association of all of the employees. The purpose of the Association was to provide means for collective bargaining and the peaceful adjustment of employee grievances. In a proceeding commenced by a rival organization under Section 10 of the Act, the Board held that the Association must be disestablished, principally because of the participation of the supervisory agents in its affairs. Such a decision of the case, the Court held, was required to accomplish the purposes of the Act. The Court outlined the

purpose of Congress to draw a line between management and union labor (p. 266):

> "Before enactment of the National Labor Relations Act this Court had recognized that the maintenance of a 'company union,' dominated by the employer, may be a ready and effective means of obstructing self-organization of employees and their choice of their own representatives for the purpose of collective bargaining. Section 2 (3) of the Railway Labor Act of 1926, had provided that representatives, for the purposes of the Act, should be designated by employer and employees 'without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.' * * *
>
> "Congress, in enacting the National Labor Relations Act, had in mind the experience in the administration of the Railway Labor Act, and declared that the former was 'an amplification and further clarification of the principles' of the latter."

—and held that one of the principal purposes of the Act was to prevent any participation in union affairs by those on the management side of the line (pp. 267-268):

> "* * * To secure to employees the benefits of self-organization and collective bargaining through representatives of the employees' own choosing, the Board was authorized by § 10 (c) to order the abandonment of unfair labor practices and to take affirmative action which would carry out the policy of the Act.
>
> "* * * The report of the House Committee on Labor on this feature of the Act, after pointing out that collective bargaining is 'a sham when the employer sits on both sides of the table by su-

porting a particular organization with which he deals,' declared: 'The orders will of course be adapted to the need of the individual case; they may include such matters as refraining from * * * bargaining with an organization corrupted by unfair labor practices.' Report of the House Committee on Labor, *supra*, pp. 18, 24.

"It is plain that the challenged provisions of the present order are of a kind contemplated by Congress in the enactment of § 10 (c) and are within its terms."

Of all of the unfair labor practice cases which have been prosecuted by the Board since 1935, a large and perhaps a major fraction have been intended, at least in part, to accomplish the purpose of the Act described in the *Pennsylvania Greyhound* case, by making it certain, in so far as the Board can make anything certain, that no rank and file labor union shall be influenced, or assisted, or subject to any participation in its internal affairs, by any representative of management. It has long been established that, far from having any right to "form, join or assist labor organizations," the representatives of management must maintain the strictest aloofness and neutrality towards the unions which represent their subordinates; and that any failure in this duty, on the part of any such representative of management, whether authorized or not, must be imputed against the employer. A fair statement of the settled rule appears in

Solvay Process Co. v. N.L.R.B., 117 Fed. (2d) 83 (5 C.C.A., 1941). In this case, two foremen—in "the front line of management," expressed views in opposition to a C.I.O. union to certain of their subordinates,

and spoke in favor of another organization. Of this the Court held (p. 84):

> *"Hurt and Hargroder were recognized by the manager of the company as occupying supervisory capacities as a part of the management, and, as such, constrained to remain aloof from and neutral to any organization activities of the employees.* Although the consistent policy of the company, as repeatedly announced by its proper officials, was to comply with the provisions of the National Labor Relations Act by permitting its employees to organize a labor union and to bargain collectively through representatives of their choosing without interference, restraint, or coercion from the management, and, *although the actions of the foremen were contrary to the orders of the company manager and to the express policy of the company, there is no doubt that they constituted unfair labor practices by the employer."* (Italics supplied)

In *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514 (1941), this Court explained that the rule so declared in *Solvay Process Co. v. N.L.R.B.* is based not upon any doctrine of agency, but upon the fact that, to accomplish the purposes of the Act, the sharp line between non-union management and union labor must be maintained and observed, and every regular representative of management must be required to hold himself aloof from and neutral to all activities of unions of the rank and file (p. 521):

> "The question is not one of legal liability of the employer in damages or for penalties on principles of agency or respondeat superior, but only whether the Act condemns such activities as unfair labor practices so far as the employer may gain from them any advantage in the bargaining process

> of a kind which the Act proscribes. To that extent we hold that the employer is within the reach of the Board's order to prevent any repetition of such activities and to remove the consequences of them upon the employees' right of self-organization, quite as much as if he had directed them."

In drawing the line between management and labor, which is required to effectuate the purposes of the Act, this Court and the other Courts have always accepted the traditional view reflected in the passages from the Board's Second Annual Report which are quoted above. Any individual who regularly expresses or exercises the authority of management over the rank and file, however subordinate his station in the hierarchy of management, is on the management side of the line; and every such individual must be restrained, by superior authority if not by his own inclinations, from any act or utterance which influences the success or failure, or which involves him in any of the internal affairs, of any rank and file union. This is established in the cases just cited; in

International Association of Machinists v. N.L.R.B., 311 U.S. 72 (1940);

N.L.R.B. v. Link Belt Company, 311 U.S. 584 (1941);

—and in scores of other decisions.

This principle, of course, condemns utterly the Board's new idea that corporate officers and foremen and policemen and other representatives of management have rights under the Act to form, join, assist, and be represented by, rank and file unions. The two interpretations of the Act cannot coexist in practice. Instead it must follow from the cases just cited that the agents

of management are not subject to be represented, under the Act, by rank and file unions; for it has been settled (and it is an inescapable implication of the Act) that all those who *are* subject to union representation under the Act, must be free to join or assist unions of their own choosing, which are eligible to represent them, or, on the other hand, to refuse to join and to oppose and condemn unions of which they do not approve. These are amongst the rights which the Act was principally intended to assure to the classes of employees for whose benefit it was enacted. In

Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197 (1938), the Court said (p. 238):

> "* * * The Brotherhood and its locals were entitled to solicit members and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act."

(c) THE BOARD'S NEW RULE WOULD VIOLATE THE PURPOSE OF THE ACT TO AVOID ANY UNNECESSARY IMPAIRMENT OF THE FUNCTIONS OF MANAGEMENT.

It is made plain by the cases discussed in the preceding section of this brief that Congress must have intended that the Labor Board should maintain the line between management and labor; encouraging the formation and support of unions by those on the labor side of the line, and forbidding and preventing the formation, domination or assistance of those unions by persons on the management side. As these cases show, the kind of

rank and file unions contemplated by the Act could not exist or function, were they to be subject to either the support of management or its agents, or to their active opposition.

That is, however, but one phase of the rule requiring the maintenance of the line between management and labor, and forbidding to representatives of management the rights to join (or be represented under the act by) those unions which undertake to represent the rank and file. It has long been recognized that the rule has another phase, and that there is at least one other reason why rank and file unions must, to accomplish the purposes of the Act, be denied legal qualification as exclusive representatives of foremen and others on the management side of the line.

The Board has always recognized this second branch of the rule. Prior to the formulation of the new doctrine of the *Jones & Laughlin Steel Corporation* coal mine supervisors' case, the Board declared in case after case that the Act was not intended to destroy but was intended to preserve such well-established relationships between management and labor as, for example, that which made it the traditional duty of the foreman, in matters involving any conflict between the respective interests of employer and employee, to maintain a single-minded loyalty to the employer.

In *re Soss Manufacturing Co.*, 56 N.L.R.B. 348 (1944), the Board summarized its position concisely. Speaking of cases, real or supposed, of the kind in which some rank and file union had sought to become exclusive representative of supervisors, the Board said (p. 351):

> "* * * Moreover, the very existence of this situation tended to disrupt well-established rela-

tionships between management and labor. The express purpose, of course, for which foremen and other supervisory officials are hired, is to represent management in its dealings with production workers. In such situations, management is, of course, entitled to the undivided allegiance of the foremen, which implies such foremen being free from the orders and directions of organizations composed primarily of subordinate employees."

And in *re Rochester and Pittsburgh Coal Company*, 56 N.L.R.B. 1760 (1944), the Board reaffirmed its traditional rule, and described the two phases now under discussion here, saying (p. 1764):

> "* * * *The Maryland Drydock* and *Soss* cases, taken together, clearly condemn the representation of ordinary employees and supervisory employees by the same labor organization, both because of the inherent threat to the freedom of choice by ordinary employees and because of the irreconcilable and conflicting positions in which such affiliations would place supervisors."

Although the Board has recently abandoned it, or ignored it, the principle of the decisions of the *Soss* and *Rochester and Pittsburgh Coal Company* cases undoubtedly reflected a sound and correct interpretation of the Act. As has been observed, it is to be doubted that, when it passed the Act, Congress foresaw the precise problem under study in this case; for Union organization of any of the traditional representatives of management was unheard of in 1935, in the industries to which the Act is peculiarly adapted. However, it is certain, as is shown by the decisions cited in the preceding section of this brief, that Congress did intend to maintain the

existing, traditional distinctions between labor, represented by unions, and management, dealing with labor and with unions through non-union agents. And the success of this purpose of the Act, or of any other project based on the same premises of social organization, necessarily required in 1935, and still requires today, the existence of managerial agents who are not subject to the control of their subordinates, or to the control which might be exercised over them by any union qualified as their exclusive representative, but dominated by the rank and file.

Putting the same thing another way, the Act was not intended to result in any destruction of efficient managerial authority or in any other consequence similarly undesirable in a civilized, industrial society; and it was intended, on the other hand, to require the Board, among other things, to avoid such undesirable results in the enforcement of the Act. The general principle which operates here is explained in

Southern Steamship Co. v. N.L.R.B., 316 U.S. 31 (1942), a case in which a shipowner discharged certain seamen who had, while their ship was safe in port, engaged in a strike, in violation of their duty of obedience under the maritime law; the Board had ordered their reinstatement; and the Court was called upon to review the Board's order. Under a literal construction of the Act, the order was clearly within the powers of the Board; and it was well calculated, also, to effectuate the purpose of the Act to encourage the processes of collective bargaining. This Court, however, set the order aside, holding that its tendency to accomplish this one express purpose of the Act could not justify it, because it tended also to defeat the equally important policy,

declared in other laws and implied in this Act, which requires the maintenance of the traditional discipline of seamen. The Court said (p. 47):

> "* * * It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.
>
> "* * * While we have no doubt that the danger to the vessel was considerably less than it would have been had the strike occurred at sea, we have already indicated that it was certainly present and that considerations other than immediate danger to the ship require maintenance of discipline throughout the voyage."

The principle of the *Southern Steamship Company* case is a broad one. It is not to be restricted in its application to cases in which it deprives of the right to reinstatement employees discharged for violations of federal laws, or of state laws (*N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939)), or for violations of their duty to conform to proper discipline (*N.L.R.B. v. Williamson-Dickie Mfg. Co.*, 130 Fed. (2d) 260 (5 C.C.A., 1942) pp. 267-268), or for violations of their duty to avoid trespasses in the assertion of their demands (*N.L.R.B. v. Indiana Desk Co.*, 149 Fed. (2d) 987 (7 C.C.A., 1945) pp. 995-996). Instead, it is a gen-

eral principle limiting the Board's authority in every type of case, by requiring that it shall make no order which, though it may accomplish some purpose of the Act, will at the same time, and in a manner not specifically authorized by the Act and not intended by Congress, subvert some other rule of law or principle of public policy or social good. This is illustrated in

Phelps-Dodge Corp. v. N.L.R.B., 313 U.S. 177 (1941), a case in which this Court considered the validity of a "back pay" provision of a reinstatement order, made by the Board. During periods of wrongful discharge, certain employees had accepted other, temporary employment, while others had deliberately rejected opportunities to do so. In computing the back pay liability, the Board had credited the employer with the amounts actually earned in mitigation by the former class of employees, but had refused to consider any deduction whatever from the amounts owing those who had refused to work. This method the Board found a simple one, and it was calculated, of course, to discourage future violations of the Act. But it was nevertheless forbidden, because it encouraged idleness and subverted the public policy which favors industry. Of this the Court said (p. 198):

> "* * * Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred. To this the Board counters that to apply this abstractly just doctrine of mitigation of damages to the situations before it, often involving substantial numbers of workmen, would put on the Board details too burdensome for effective administration. * * *

"But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. (p. 200):

"* * * By leaving such an adjustment to the administrative process we have in mind not so much the minimization of damages as the healthy policy of promoting production and employment."

Beyond any question, the preservation of good management and of proper discipline in industry are socially desirable factors, which are respected and upheld by our state and federal laws in general. They must be preserved and upheld in an industrial society of the kind contemplated by the National Labor Relations Act, and if the purposes of the Act itself are to be achieved. The Act was, as its preambles declare, intended not to cripple or hamper private industry, but to stimulate it and encourage its prosperity. Its encouragement of the organizations of unions was a means to this end, and not an end in itself; and it was certainly not intended that the Act should, in its encouragement of unions, go so far as to destroy any socially necessary function of management.

And yet, if the declared *rationale* of the Board's new rule in such cases as this were to be accepted, and enforced in any real way as a correct interpretation of the Act, the functions of management would be greatly hampered and impaired, and possibly destroyed. The first duty of management is to manage. This it can do only through the loyal and efficient agency of individuals: corporate officers, foremen, industrial police and

all the other less important classes who have always represented management in its dealings with the rank and file who make up the body of union labor. It cannot continue to function as it has always functioned, if its agents in these dealings are required, in violation of the first and oldest principle of the law of agency, to divide their loyalty between it and the very members and representatives of the rank and file with whom they must deal.

(d) THE BOARD'S NEW RULE, IF APPLIED TO THE MILITARY OR MUNICIPAL POLICE WHO FIGURE IN THIS CASE, WOULD VIOLATE THE PURPOSE OF THE ACT TO AVOID ANY INFRINGEMENT OF THE PUBLIC INTEREST IN THE PRESERVATION OF LAW AND ORDER.

Under the rule of the Court's decisions of the *Southern Steamship Co.* and *Phelps Dodge Corp.* cases, the Board is forbidden to make any final order which, though calculated to effectuate some purpose of the Act, is likely to subvert or destroy, in a manner not contemplated by the Act, any interest of management which the law in general is intended to protect. Under the same rule, the Board is forbidden, with even greater force, to make any order which prejudices, in a manner not contemplated by the Act, any legally recognized public interest.

In the decision now under review here, *N.L.R.B. v. Jones & Laughlin Steel Corporation,* 154 Fed. (2d) 932, the Court below relied particularly upon this principle. This appears in the following passages of the Court's opinion (pp. 934-935; R. 121-122):

> "* * * The precise question here is not whether the plant guards should be permitted to organize, but whether the peculiar classification

into which they fall makes it improper for the Board to permit their organization by the same union which represents the production employees. As revealed by the stipulation, the plant guards, even though their military service has ceased, perform a service which in its public aspect is closely analogous to that of the military police. Under the statutes of Ohio, of which we take judicial notice, the plant guards are peace officers (§ 13432-1, General Code of Ohio), charged on behalf of the public with preventing injury to property, breaches of the peace and criminal offenses, including misdemeanors and felonies. * * * Counsel for the Board admits that the plant guards are part of the municipal police force and have and exercise the legal powers of police officers. During the year 1945 they not only made ordinary investigations of thefts, accidents, etc., on the respondent's premises, but they made arrests for major felonies.

* * * * * * *

"* * * Their functions and obligations therefore are of a dual character. They have a private obligation to their employer and an obligation to the community as sworn, bonded and commissioned police officers. In case of industrial unrest and strikes on the part of the production employees, the obligations of the plant guards to the municipality and state would be incompatible with their obligations to the Union which, since it represents production employees, authorizes and directs the strike.

"* * * We adhere to our conclusion that in the order involved here the Board failed to give

adequate consideration to the public welfare. A contrary conclusion would open wide the door to disorderly and criminal acts because of the limitation which the Board's order places on the power of the Government to furish adequate police protection."

These views involved nothing new. They were consistent, of course, with the rule of the *Southern Steamship Co.* case and of the *Phelps Dodge Corp.* case, and all the other related decisions of similar points. The court below cited and followed the most squarely parallel precedent:

N.L.R.B. v. Delaware-New Jersey Ferry Co., 128 Fed. (2d) 130 (3 C.C.A., 1942) in which the Circuit Court set aside a Board order which was intended to require that the owner of a line of steam river ferries should recognize a single labor union as the exclusive representative of both the licensed officers and the unlicensed seamen serving in his vessels. Condemning this order, the Court said (p. 137):

"The history of maritime employment shows the importance of the obedience of the sailor to his officers. This is necessary to maintain the safety of the ship, the cargo and the passengers, and it is true of a ferry boat though individual voyages are shorter. To group officers in command with employees who owe the duty to obey the commands in one bargaining unit seems to us to be dangerous.

"It is true that few, if any, of the licensed officers object to being included in a bargaining unit with the unlicensed personnel. This is not a controlling factor although it is one which we have con-

sidered. But the point here is not what the officers want, nor what the men want, nor what the company either wants or is willing to acquiesce in, but rather, what is the public interest. The Board's duty to serve the public interest cannot be affected by the desires or acquiescence of the parties."

The principle declared here was, as a little reflection will show, simply another application of the rule of the *Southern Steamship* and *Phelps Dodge* cases. In the decision of this case in the Court below, it was recognized as such, and the Court properly followed it. The public has an interest in the integrity of public peace officers at least equal to its interest in the integrity of the licensed officers of steam vessels; and the effects of representation by rank and file unions are the same in one case as in the other.

If the discharge of his duty requires it, the licensed marine officer must be prepared to deal with his subordinates with resolution and firmness. And similarly, if the discharge of his duty requires it, the peace officer who stands, sometimes alone, for law and order in a large steelworks, must be prepared to deal with every member of the public—which in fact means with the numerous members of the rank and file—with an equal or greater degree of resolution and firmness. If either officer is likely to fail in this function, in any matter of importance, he is worthless; and the public interest is in some degree lost. And yet it is a simple matter of common sense, that no marine officer and no police officer, having any human regard for his own welfare, can possibly be as free to exercise his authority against brother members of a rank and file union, as he can against others, to whom he bears no such relationship. If a labor union

dominated by the rank and file be qualified as his exclusive representative, such an officer must avoid the bad graces of the rank and file, for if his conduct of his office offends the rank and file, for any real or fancied reason, their union has the power to deprive him of his authority, his security and possibly his job. If any such retaliation is based upon the Union's conclusion that he has broken his vows of brotherhood to every other union member and of obedience to union laws (see p. 78, *infra*), he must become, during the Union's displeasure, a sort of outlaw, having no effective right or power, as an individual, to protect himself: see *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332 (1944).

5. *In the separation of non-union management and union labor contemplated by the Act, the police involved here must be classified as agents of management.*

In earlier sections of this brief (pp. 37-54, *supra*) are discussed the decisions of this Court and the subordinate Courts, and the other authorities, which have made it clear that, under the forms of industrial organization contemplated by the Act, the Board must distinguish management from labor, discourage either any intrusion into the affairs of rank and file labor unions by the agents of management who represent it in its dealings with the rank and file, and, finally, forbid any representation of such managerial agents by rank and file unions. In every such case as this, the application of these general rules calls for a classification, as management or as labor, of the individuals directly affected by the Board's decision. Here, for example, the question is: Are the policemen management, or are they rank and file labor?

In section 2 (2) of the Act is defined the term "employer"—the word used later in the Act to describe the kind of individual who must remain aloof from rank and file unions and their activities under Section 8 (2), and who cannot be represented by a rank and file union. The relevant part of the definition is as follows:

> "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, * * *"

Literal interpretation of this language is as improper as it is in the case of the definition of "employee" in Section 2 (3), for this "definition" of "employer," read literally, would probably describe every person who is an "employee" under the "definition" of that term; and the result would be an absurdity.

Therefore, in keeping with the canons of construction which have been discussed, instead of a literal interpretation, the Courts and the Board have always adopted the interpretation necessarily implied by the purposes of the Act, and have held that an "employer" —who can have no part in the affairs of rank and file unions—is "any person who acts in the interests of an employer, directly or indirectly" *in his dealings as such with the employer's rank and file employees.*

This definition, clearly implied in the Act, necessarily includes every agent, however high or low his station, through whom the authority of management is regularly expressed and imposed upon the rank and file of labor: upon those workers for whom the Act was intended to provide, and has generally provided, unions free from any influence by management. This was illustrated in an early case, which has already been mentioned:

International Association of Machinists v. N.L.R.B., 311 U.S. 72 (1940), a case in which the Court passed upon and upheld the validity of an order by which the Board had disqualified an A. F. of L. union as an aspirant representative of certain rank and file employees. The Board's order was based upon testimony that the union had received assistance, in its organizational efforts, from four supervisors or part time supervisors. The union, of which the four were regular members, objected strongly that their positions in management were unimportant (they were at most what the Board described as industrial "traffic cops" in its decision of the *Packard Motor Car Company* case), and that their activities in its behalf were within their rights as members of union labor. This argument would have been valid, were the Board's new rule under review here a correct one; were it true, that is, that every foreman is an "employee" and as such guaranteed the right to form or assist unions of his own choosing. But, adhering to the sound principles which have been discussed above, the Court rejected it, saying (p. 80):

> "* * * We are dealing here not with private rights (Amalgamated Utility Workers v. Consolidated Edison Co. 309 US 261, 84 L ed 738, 60 S Ct 561) nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence. * * * As we have said, Fouts, Shock, Dininger and Bolander all had men working under them. To be sure, they were not high in the factory hierarchy and apparently did not have the power to hire or to fire. But they did exercise gen-

eral authority over the employees and were in a strategic position to translate to their subordinates the policies and desires of the management."

Under this ruling (and it is only one of a multitude of decisions which establish the point) the Act places on the management side of the line between management and labor, any agent of management who regularly "exercises general authority over the employees"—which of course means over the rank and file, or who is regularly in a position in which he is enabled, and called upon, to "translate the policies and desires of the management" to the rank and file. Under this ruling, the participation by any such agent of management in the affairs of a rank and file union is forbidden by the Act, and destructive of the purposes of the Act.

Perhaps some industrial "watchmen," or even some employees who are called "police" do not fall upon the management side of the line here established; but it is certain that, under the rule of the *International Association* case and the others, the policemen at the Otis Works, who are involved in this case, are "employers" under the Act. They are regular agents of management, regularly exercising "a general authority over the employees," regularly charged with the duty "to translate the policies and desires of the management" to the rank and file, and when necessary to enforce them, in a way normally beyond the power of any other agency of management, against the rank and file.

There can be no dispute about the facts of this matter in this case. At the Board's original hearing in the case, the evidence on this subject included the following (R. 6):

"It must be borne in mind that these guards are charged with the responsibility for the protection of the physical plant and equipment of the Corporation. It is their duty to keep intruders out, to see that the rules and regulations of the Corporation are maintained within the plant for the benefit of all concerned, to see that the peace is kept, and to act as conservators of the legal rights of the Corporation.

"The duties of these guards do not differ greatly from the duties performed by members of a city, county or state police force. They do, however, have the additional responsibility of carrying out assignments of management which are very often of a confidential nature, and allegiance to management must be unquestioned.

"Any thing which might tend to be destructive to the discipline normally manifested in a guard force can have no other effect than weakening the plant protection system set up to effectively preserve and maintain industrial operations."

This was not contradicted. Instead, these things were necessarily accepted as facts of the case; and they were later included in the stipulation, laid before the Court below by the Board, in the following language (R. 115-116):

"5. When on duty, all members of the guard force are required to wear police badges, and uniforms of a military style, and they are armed with police revolvers and clubs or batons, and, when the occasion requires, with other arms and police equipment.

"6. The principal functions of the guard force include the following:

(a) To protect the real and personal property of the Corporation which is comprised by the Otis Works, and the property of employees and others in the Works, from any damage, injury, theft, or trespass, which might otherwise be caused by fire, storm or other casualty, or by any act of trespass, or sabotage, or other wrongful act.

(b) To maintain peace and good order at all times among all others employed in the Otis Works, by demanding and enforcing obedience to the safety and other rules of the Corporation, and to all applicable public laws and ordinances, and by preventing or arresting any violation thereof or any breach of the peace in or near the Works.

(c) To detect and if possible prevent any criminal act in or near the Works; to investigate and report, in confidence to their superiors, all crimes, suspected crimes, irregularities and casualties occurring in the Works; and to assist in the criminal prosecution of any person who may lawfully be charged to have committed or attempted any such crime."

From 1935 until 1942, in the cases which came before it, the Board invariably classified police officers having duties of the character so described in this record, as agents of management, who must be excluded from the jurisdiction of rank and file unions. They were given the same status for this purpose as the Board then gave to foremen and all other supervisory and managerial agents, and it made no difference whether they were the holders of municipal police commissions, or were purely private agents. Often, as was true in cases involving foremen, the Board's interpretation was approved by the unions. More rarely it was not. The decision was the

same in either event. For example, in the early case of *In re R.C.A. Manufacturing Co.*, 2 N.L.R.B. 159 (1936), the Board denied the request of a C.I.O. union that a small group of private plant guards be included in a large body of rank and file laborers, for which it desired to become the exclusive representative, saying (p. 164):

> "* * * The watchmen in the maintenance division, classified as guards by the Company and possessing a uniformed appearance, are a group obviously separate from the regular production employees. None of the above for the reasons stated should be included in the same bargaining unit with the production employees."

For years thereafter, in case after case, arising under Section 9, the "representation" section of the Act, the Board applied the same rule. Examples of this practice include the following decisions:

Burnside Steel Foundry, 7 N.L.R.B. 714 (1938);
Southport Petroleum Co., 8 N.L.R.B. 792 (1938);
Elliott Bay Lumber Co., 9 N.L.R.B. 3 (1938);
Ingram-Richardson Mfg. Co., 9 N.L.R.B. 200 (1938);
Inland Steel Co., 9 N.L.R.B. 783 (1938);
Southern California Gas Company, 10 N.L.R.B. 1123 (1939);
F. E. Booth Co., 10 N.L.R.B. 1491 (1939);
Automotive Maintenance Co., 13 N.L.R.B. 338 (1939);
Armour & Co., 13 N.L.R.B. 1143 (1939);
American Machine & Foundry Co., 14 N.L.R.B. 497 (1939);

Magnolia Petroleum Co., 18 N.L.R.B. 380 (1939);
Cleveland Hobbing Machine Co., 18 N.L.R.B. 412 (1939);
Todd-Johnson Dry Docks Co., 18 N.L.R.B. 973 (1939);
Armour & Co., 26 N.L.R.B. 1046 (1940).

And in unfair labor practice cases during the same period, the Board held, consistently with its practice in election cases, that industrial policemen were agents of management, and on the management side of the management-labor line. For example, in

Re West Kentucky Coal Co. and U.M.W.A., 10 N.L.R.B. 88 (1938); reviewed and enforced 116 F. (2d) 816 (6 C.C.A., 1940), the Board disestablished a labor organization, called the "E.M.B.A.," and held the employer in the case guilty of unfair labor practices, because the employer's private, industrial police had assisted the union so condemned and had been active opponents of a rival organization. The Board said (p. 105):

> "Working hand in hand with the E.M.B.A. in obtaining signatures to the cards reaffirming allegiance to the E.M.B.A., as described above, and in numerous other ways endeavoring to prevent the progress of the Union, were the guards. Richardson contended that the guards who were employed by the respondent were necessary in order to protect its property. While this may be true to some extent, the principal activity of the guards was to interfere with the employees in the exercise of the rights guaranteed by the Act, by coercing them into

joining or remaining members of the E.M.B.A., and by preventing their joining the Union or associating with its organizers.
(p. 107):

"The Union held advertised mass meetings at various places throughout the three counties in which the respondent's mines are located. These meetings were attended by guards and supervisory employees of the respondent, in particular by Beanie, Mansfield, Omers, and Shoulders, Superintendents Christian and Jones, Ray Cobb, assistant general superintendent of the respondent's Earlington division, and H. B. Hinton, foreman at No. 2 mine. The presence of these individuals at a meeting could have had no other consequence than to destroy its effectiveness.

In short, the Board treated the police as "employers" under the Act, and imputed their pro-union and anti-union conduct to the management, as a kind of wrong for which management as a whole must be held responsible. This could not have been done, had the Board considered then, as it argues in its brief now, that industrial police are invariably to be classed with the rank and file, as "employees," whose rights to assist or oppose unions must be enforced and cannot be denied.

6. *The status of policemen under the Act is not affected by the inconclusive experiences described in the Board's brief.*

In 1941 or 1942, at about the time when it first questioned its own rule concerning the status of foremen and supervisors under the Act, the Board for similar reasons (principally the pressure of claims asserted by certain large, industrial unions) wavered also in its adherence to the same rule as it applied to industrial policemen. The result in cases involving policemen (unlike that in the cases which involved foremen) was an early relaxation of the Board's old rule. Since 1942, the Board has on many occasions issued "decisions" and "directions of elections" by which it has developed and declared its intentions that the old rule shall be abandoned, and that the industrial policemen of the country shall be made subject to union organization and representation under the Act. These "decisions," beginning with the case of the *American Forge Company*, 44 N.L.R.B. 826 (October 6, 1942) were listed in the Board's petition for rehearing in the Court below, and the list is reproduced in the transcript here (R. 107-111).

This list is not entitled to the weight in this case which the Board's brief would give it. In its assertion (R. 107) that in all the decisions it lists the Board had approved "the bargaining pattern involved herein," the heading of the list is somewhat misleading. The assertion is true only to the extent that each of the decisions cited has reflected the Board's approval of *some* form of union representation for *some* kind of police or watchmen. Beyond this, the list has no relevant significance, for it includes indiscriminately cases involving the representation of militarized police, of non-military police

holding other types of commissions (none, however, like those of the Otis Works police), of private guards and of watchmen of all kinds; cases involving the representation of these diverse types of agents by rank and file unions, by unions representing only policemen, and by unions bearing other kinds of responsibility; and cases involving small factories and shops, office buildings, banks, and other establishments in which the problems of maintaining obedience to law, security, discipline and good order bear no resemblance to those presented in the huge, remotely located properties of the Otis Works. Such a wholesale catalogue of cases of all kinds is of no value here, except to the extent that it records the complete change, during the war years, of the Board's interpretation of the Act.

Even more important as a criticism of the Board's list, and of the argument sought to be based upon it, is the fact that none of the "decisions" listed by the Board's counsel has ever become a legally enforceable adjudication of the status of any policeman or watchman under the Act. All of the "decisions" listed were preliminary, interlocutory declarations, and none of them has ever been made final. Some of the cases have been abandoned by the Board and some by the interested parties. Some of the cases became moot by reason of the disappearance of the industrial establishments or the guard forces with which they were concerned. In others (doubtlessly those where the point did not matter to one side or the other) the parties agreed upon some *modus vivendi*, and so made further prosecution by the Board unnecessary and undesirable. As results of a variety of circumstances, of the characters just described and possibly others, none of the other cases listed by the Board ever assumed sufficient importance to anybody to justify any judicial

test or enforcement of the Board's "decision." Thus the only judicial decisions of the point presented here are the decisions—wholly adverse to the Board's new rule—entered by the Circuit Courts of Appeals in this case and in the companion *E. C. Atkins Co.* case.

The Board's reflections upon its list of cases, in its brief here, are not helped by its suppositions (based apparently only upon its lack of any report to the contrary) that in certain instances in which employers have voluntarily acquiesced in the union representation of their private policemen or watchmen, no notoriously evil consequences have followed.

Acquiescence of employers signifies nothing here. Such acquiescence on the part of an employer has meant, invariably, that the freedom of his police or watchmen from obligations to unions is a matter of no importance to him; that their duties to the employer are such, in short, that the employer has seen no incompatibility between them and the obligations of union membership. Such voluntary arrangements, whether they have been successful or not, are of no practical value here, in other words, because they have always depended upon circumstances which are not present in this case.

Although the union representation of watchmen and guards who deal with the general public, and not with rank and file labor (the case, for example, of the guards in a metropolitan bank), involves no great risk of the interests of the employer, the absence of objectionable consequences in cases of this kind cannot, of course, be a guide in the case presented here. On the contrary, it is a fact (although there is no reason why the Board should have any record of it) that no plan of the kind

defended in this case by the Board, no plan to unionize military police or municipal police in an establishment having any of the material characteristics of the Otis Works, has ever failed to impair the efficiency of the police force affected by it.

Finally, in closing this branch of the argument, the Board's references to its admittedly inconclusive experience are based upon a false view of its own powers and duties. If, as this brief is intended to show, the representation of policemen by rank and file unions was not contemplated by the Act, or if it will tend to subvert any of the purposes of the Act, then it must follow that the Board cannot lawfully command it; and this limitation of the Board's powers is not affected or relaxed by the views of this employer or that, or by those of any representative of labor, or even by those of the Board, concerning the merits of such union representation.

7. The status of the policemen who are involved in this case is not affected by their "demilitarization."

Certain portions of the Board's brief, those which relate to the Regulations issued by the Secretary of War for the guidance of the officers and members of the force of Auxiliary Military Police, are simply confusing if any attempt be made to apply them to this case. Unless they are intended to bear in some way upon the companion case of *E. C. Atkins & Co.*, these passages of the Board's presentation appear to argue points of fact and law which are not in controversy.

It was never contended by the Jones & Laughlin Steel Corporation, the owner and operator of the Otis

Works, and it was never held by the Court below, that the representation of the Otis Works police force by the rank and file steelworkers Union local was legally objectionable because, as Auxiliary Military Police, the policemen had become the agents of the United States and so had ceased to be "employees," under the exemption of federal *agents contained in* Section 2 (3) of the Act. It was shown at the earliest hearing of the case before the Board that (as were the facts) the police had been sworn and enrolled as Military Police; and it was contended, then and later, that their duties as Military Police, and their continuing duties as agents of management, were such as to require their freedom from any control, union or other, which might prejudice their courage and independence in their dealings with the rank and file, or with anyone else who might conceivably have interests adverse either to those of the Steel Corporation or to those of the United States.

In other words, from the beginning of the proceeding before the Board, the Steel Corporation has relied upon the same basic arguments which have already been made in this brief. Those arguments were not affected by the facts that the Otis Works police were "demilitarized" in May or June of 1944, and that their commissions as peace officers of the City and State Governments were thereupon revived. This change of their formal, official status did not result (and the military authorities intended that it should not result: R. 118) in any change of those functions and duties of the policemen which have affected their status under the National Labor Relations Act (R. 117).

After the demilitarization, the Steel Corporation was (as the Board's brief says) charged by federal

and state laws with the same responsibilities to maintain order and security in the steelworks, which it had borne before the demilitarization. After the change, as before it, the policemen were the only peace officers normally available in the steelworks, either to enforce the law or to enforce the lawful authority of management. As the Board has stipulated (R. 117), they did the same work, occupied the same positions in the Steel Corporation's plans of operation and management, and discharged the same useful duties to society at large. And, what is important to the purposes of the Act, the inconsistencies between their obligations as peace officers and agents of management, on the one hand, and the rights and obligations incident to their representation by the rank and file union on the other, were the same after the demilitarization as they had been before it.

These circumstances compel the view of the respondent, declared at the beginning of this argument, that the fact of demilitarization, followed as it was by the revival of the municipal police commissions, is a matter of no consequence in the proper disposition of this case. There is no dispute about the duties of the policemen; no need to argue at length the meaning of the military regulations; and, finally, no need to discuss the Board's proposition, never contested and not to be contested now, that the case is not moot.

III. Conclusion.

This is, with the companion case of *E. C. Atkins & Co.*, a case of first impression, in that the Courts have not heretofore decided the precise questions of interpretation of the National Labor Relations Act which are presented here.

It is true that the Courts have not, in any earlier case, settled the important question whether any union, and in particular any rank and file union, can command recognition, under the Act, as exclusive representative of any of the officers, foremen, policemen and others through whose agency employers deal with the rank and file of labor, and on occasion direct or control the members of the rank and file; or the intimately related question of the status under the Act, in this connection, of industrial police who are commissioned and relied upon by the State as its peace officers.

This does not mean, however, that these are difficult questions. It has been the purpose of this brief to show that they are not; that any difficulty they might otherwise present, has been eliminated, long since, by the teachings of the past decisions of this Court and the subordinate Courts.

By those earlier cases, two important purposes of the Act have been ascertained. It has been established by those cases that Congress contemplated and intended, when it formulated and passed the Act, among other things that the Board should preserve a sharp line between management and labor, for the two reasons which have been discussed here; and that the Board

should not, in its efforts to effectuate the policies of the Act, take any action which must subvert or infringe any other law, or any recognized consideration of public good.

If these principles be applied to the facts of this case, with a proper regard for the canons of construction, for the advantages of consistency and certainty in the definition of legal terms and legal rights, and for the practical consideration of fairness, justice and good economy which are present in every case of this kind, the only possible conclusion of the matter must be that reached by the Circuit Court of Appeals. It is submitted that its decision was a sound and correct one, which should be affirmed here.

Respectfully submitted,

JOHN C. BANE, JR.,
Attorney for Jones & Laughlin Steel Corporation.

Of Counsel:
H. PARKER SHARP,
PAUL J. WINSCHEL.

APPENDIX.

NATIONAL LABOR RELATIONS BOARD
WASHINGTON 25, D. C.
December 18, 1945

John C. Bane, Jr., Esquire
Messrs. Reed, Smith, Shaw & McClay
Union Trust Building
Pittsburgh, Pennsylvania

Re: *N.L.R.B. v. Jones & Laughlin Steel Corporation*
No. 9730 (C. C. A. 6)
Board No. 8-C-1548

Dear Mr. Bane:

I understand from Mr. Mallet-Prevost that the Jones & Laughlin Steel Corporation and the Board will stipulate the facts as to the demilitarization of, and as to the present number and function of, the plant guards involved in the above case, and will file briefs with the Court prior to argument during the February term.

I am enclosing a copy of a letter we received recently from the Army Service Forces establishing the fact of demilitarization on May 29, 1944. Mr. Mallet-Prevost tells me that he had expected to hear from you before now with respect to the present function of the guards. Since it is imperative that this case not be unnecessarily delayed further, I urge you to send us, by return mail, whatever factual material you wish to include in the stipulation. We will then prepare a draft

of the stipulation and forward it to you for your approval.

Yours very truly,

A. NORMAN SOMERS /s/
A. Norman Somers
Assistant General Counsel

Enclosure (1)

December 20, 1945

A. Norman Somers, Esq.
Assistant General Counsel
National Labor Relations Board
Washington 25, D. C.

In re: *N.L.R.B. v. Jones & Laughlin Steel Corporation.* No. 9730
Sixth Circuit Court of Appeals

My dear Mr. Somers:

Thank you for your letter of December 18, 1945.

We are accumulating the material required for the proposed stipulation, but that matter has been delayed by my own schedule, which has required me to be out of town during most of the time since I talked to Mr. Mallet-Prevost at Cincinnati.

I had not understood that Mr. Mallet-Prevost expected us to submit our idea of the present facts at any time before the end of the year. However, I hope to be in touch with you again before that time.

I think it should be entirely feasible to complete the proposed stipulation in time to permit the filing of

briefs in January and an argument of the case in February.

Best wishes to you for a Merry Christmas.

Yours truly,

JOHN C. BANE, JR. /s/

JCB,Jr:afs

NATIONAL LABOR RELATIONS BOARD
WASHINGTON 25, D.C.
January 15, 1946

John C. Bane, Esquire
c/o Reed, Smith, Shaw & McClay
747 Union Trust Building
Pittsburgh, Pennsylvania

Re: *National Labor Relations Board v. Jones & Laughlin Steel Corporation*
No. 9730 (C. C. A. 6)

Dear Mr. Bane:

As you no doubt have been informed, this case is set for argument before the Sixth Circuit on February 8, 1946. The Board's brief is now being prepared and will be filed in Court and a copy sent to you at the very earliest date possible. Although no dates for the filing of briefs were set by the Court, I assume that you will file the Company's brief as soon as you can upon receipt of the Board's brief.

In the meantime, since we have not received a proposed stipulation from you, we are enclosing a draft of stipulation containing the facts, insofar as we have them, which the Board desires to present. Please supply in paragraph 2 of the stipulation the facts with

respect to the present number of guards and their duties. As far as the Board is concerned, no other facts are necessary, but if you think otherwise please incorporate whatever material you wish in the stipulation and send the documents on to me with your signature.

Since the time is very short indeed, I am sure you will let me hear from you at the earliest possible moment.

Very truly yours,

A. NORMAN SOMERS /s/
A. Norman Somers
Assistant General Counsel

WESTERN
UNION

LO N GWA543 225/221 1/ 121 GOVT=WASHINGTON DC 16 657P
JOHN C BANE, JR, ESQUIRE,
CARE REED SMITH SHAW & MCCLAY=
747 UNION TRUST BLDG PGH=

RE: NLRB V JONES & LAUGHLIN STEEL CORPORATION, NO 9730 (C.C.A. 6). AS YOU KNOW, COURT HAS SET MATTER FOR ARGUMENT FEBRUARY 8. AT CONFERENCE HELD IN COURT CHAMBERS DECEMBER 4 IT WAS UNDERSTOOD YOU WERE TO SUPPLY DATA TO BE INCORPORATED IN STIPULATION CONCERNING THE PRESENT STATUS AND NUMBER OF PLANT GUARDS INVOLVED. I WROTE YOU ON DECEMBER 18, ENCLOSING LETTER FROM WAR DEPARTMENT ESTABLISHING DEMILITARIZATION OF PLANT GUARDS MAY 29, 1944 AND ASKING YOU TO EXPEDITE SUPPLYING MATERIAL. YOU WROTE BACK DECEMBER 20, INDICATING THAT THIS WOULD BE DONE WITHOUT UNDUE DELAY. YESTERDAY I WROTE YOU AGAIN, ENCLOSING A COPY OF A PROPOSED FORM OF STIPULATION EMBODYING THE INFORMATION SUPPLIED BY WAR DEPARTMENT WITH PROVISION FOR INSERTION BY YOU OF STATEMENTS OF NUMBER OF GUARDS NOW EMPLOYED BY RESPONDENT

AT OTIS WORKS PLANT AND OF THEIR PRESENT DUTIES. IN AN EFFORT TO EXPEDITE STIPULATION I PUT THROUGH A CALL TO YOUR OFFICE AS AN EMERGENCY CALL. I WAS TOLD YOU WERE OUT AND LEFT A MESSAGE FOR YOU TO CONTACT LONG-DISTANCE OPERATOR. I HAVE NOT HEARD FROM YOU. WILL YOU PLEASE WIRE WHETHER YOU ARE FORWARDING BY RETURN MAIL A STIPULATION EMBODYING THE INFORMATION CONTAINED IN THE WAR DEPARTMENT LETTER AND CONTAINING YOUR STATEMENT AS TO THE NUMBER OF GUARDS AT THE OTIS WORKS PLANT AND THEIR DUTIES=

=A NORMAN SOMERS ASSISTANT GENERAL COUNSEL NATIONAL LABOR RELATIONS BOARD.

January 19, 1946

A. Norman Somers, Esq.
Assistant General Counsel
National Labor Relations Board
Washington 25, D. C.

In re: *National Labor Relations Board v. Jones & Laughlin Steel Corporation*
No. 9730.

My dear Mr. Somers:

Enclosed herewith are two copies of a draft of a stipulation which is intended to complete the stipulation proposed in your letter of January 15, 1946. If you approve it, I think it would bring on the record of the Court in Cincinnati, in a way which would permit the Court to consider them, the new state of facts evidently contemplated by the Supreme Court's remand.

You will observe that we have attached as an exhibit a copy of a letter, dated May 29, 1944, signed by Major Hales in the Armed Service Forces Office at Cleveland. We have not attached the two letters written

long afterwards to your Board by Army officers. If you desire to attach your full correspondence, we shall have no particular objection.

In the matter of the time for filing briefs, subject to any different order the Court may make in the meantime, we shall be glad to accommodate ourselves as much as possible to your schedule. Under the general practice in this Court (and other appellate Courts with which we have acquaintance), the appellant is normally required to file his brief first, and the appellee is entitled to file an answer to the brief after a reasonable time. Since the Board appears as appellant here, this practice might be taken to mean that the Board's brief should be filed first; however, the stipulation has been greatly delayed because of my attack of influenza at the turn of the year and, more recently, by wholly unforeseen emergencies in this office, arising out of the spread of labor trouble in this district; and if it will be any accommodation to you, we shall be glad to exchange briefs with you at some time before the argument and during the first week in February. If, on reading our brief, you desire to file a reply but have no time to prepare it before the argument, we shall have no objection to the allowance of time for filing it after the argument; and we assume that you will grant us the same consideration.

Yours truly,

JOHN C. BANE, /s/

JCB,Jr:afs
Enclosures-2

NATIONAL LABOR RELATIONS BOARD
WASHINGTON 25, D. C.
January 22, 1946

John C. Bane, Jr., Esquire
Reed, Smith, Shaw & McClay
Union Trust Building
Pittsburgh, Pennsylvania

Re: *National Labor Relations Board v. Jones & Laughlin Steel Corporation*
No. 9730

My dear Mr. Bane:

I have your letter of January 19, 1946, and its enclosure.

Your suggested arrangement for the exchange of briefs is satisfactory and we plan to have a copy of our typewritten brief in your hands on or before February 1. We shall forward printed copies as soon as we receive them from the printer.

We are checking the facts in the proposed stipulation with our people in the Field and find that this is consuming a bit more time than was anticipated. Subject to such check, we are preparing our brief upon the hypothesis that the facts are as set forth in the proposed stipulation.

We shall sign and submit the stipulation as soon as the check is completed, which we are making every effort to expedite.

Yours very truly,

A. NORMAN SOMERS /s/
A. Norman Somers
Assistant General Counsel

CONSTITUTION OF INTERNATIONAL UNION
UNITED STEELWORKERS OF AMERICA
CIO

Adopted at Cleveland, Ohio, May 22, 1942

[Union Label]

Form 130 Printed in U. S. A.

* * * * * * *

MANUAL

* * *

INITIATION

President—Mr. Guide, are there any candidates in waiting who have been accepted by this Union?

Doorkeeper—Mr. President, I find Brothers.....
....., who were elected to become members of this body.

President—Admit the brothers.

The guide will admit the candidates and place them in a line opposite the President.

President—Fellow Steelworkers: The United Steelworkers of America requires perfect freedom of inclination in every candidate for membership to its body. An obligation of fidelity is required; let me assure you that in this obligation there is nothing contrary to your civil or religious duties. With this understanding are you willing to take an obligation which binds you upon your honor as a man to keep the same as long as life remains?

Each candidate answers—I am.

President—Raise your right hand.

"I do sincerely promise, of my own free will, to abide by the laws of this Union; to bear true allegiance

to, and keep inviolate the principles of the United Steelworkers of America; never to discriminate against a fellow worker on account of creed, color, or nationality; to defend freedom of thought, whether expressed by tongue or pen, to defend on all occasions and to the extent of my ability the members of our organization.

"That I will not reveal to any employer or his agent the name of anyone a member of our Union. That I will assist all members of our organization to obtain the highest wages possible for their work; that I will not accept a brother's job who is idle for advancing the interests of the Union or seeking better remuneration for his labor; and, as the steel workers of the entire country are competitors in the labor world, I promise to cease work at any time I am called upon by the organization to do so. And I further promise to help and assist all brothers in adversity, and to have all steel workers join our Union that we may be able to enjoy the fruits of our labor; that I will never knowingly wrong a brother or see him wronged, if I can prevent it.

"To all this I pledge my honor to observe and keep as long as life remains, or until I am absolved by the United Steelworkers of America."

Answer—I promise.

President—You are now members of Local Union No. ....., and entitled to all rights and privileges of members of the United Steelworkers of America.

NATIONAL LABOR RELATIONS ACT

(49 Stat. 449)

AN ACT

To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contact, and employers who are organized in the corporate or other forms of ownership asso-

ciation substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, or the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

SEC. 2. When used in this Act—

* * * * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or

political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *

* * * * * * *

SEC. 3 (c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

* * * * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce em-

ployees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective

bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board

shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, *as will* effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If, upon all the testimony taken, the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

* * * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the

proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by

the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

* * * * * * *

SEC. 16. This Act may be cited as the "National Labor Relations Act."

Approved, July 5, 1935.

Supreme Court of the United States

OCTOBER TERM, 1946

NO. 418

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

JONES & LAUGHLIN STEEL CORPORATION,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

SUPPLEMENT TO BRIEF FOR RESPONDENT.

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INDEX

PAGE

I. Purposes of This Supplemental Brief 1

1. To resolve a seeming contradiction, raised by the opposing briefs, concerning the Board's decisions in cases involving "watchmen" between 1935 and 1942 2

2. To show that the respondent's present contention, that a single union cannot represent both rank and file labor and agents of management, was raised before the Board 3

II. The Cases Cited by the Board Do Not Refute the Respondent's Contention That, Prior to 1943, the Board Excluded Policemen of the Kind Here Involved from the Jurisdiction of Rank and File Labor Unions 4

1. The Board's list of 106 cases 4

(a) Cases in which the point involved here was not raised by the employer or considered by the Board 4

(b) Cases in which all parties stipulated that the Board should treat "watchmen" as rank and file labor 8

(c) Cases in which the Board's action was contested 15

2. The other lists of cases referred to in the Board's argument 25

PAGE

3. The case of the *Luckenbach Steamship Company*, 2 N.L.R.B. 181 (1936); 10 N.L.R.B. 1355 (1939); and 19 N.L.R.B. 623 (1940) 26

III. The Respondent Raised Before the Board Its Present Contention That a Single Union Should Not Be Qualified as Exclusive Representative of Both the Police and the Rank and File, in the Otis Works 29

Conclusion 35

TABLE OF CASES.

Alaska Juneau Gold Mining Co., 9 N.L.R.B. 755 (1938) 8
Aluminum Ore Co., 8 N.L.R.B. 914 (1938) 17
American Brake Shoe and Foundry Co., The, 41 N.L.R.B. 82 (1942) 23
American Cyanimid & Chemical Corp., 31 N.L.R.B. 883 (1941) 11
American Cyanimid Co., 27 N.L.R.B. 1176 (1940) .. 7
American Hair and Felt Co., 6 N.L.R.B. 648 (1939) 17
American-Hawaiian Steamship Company, 10 N.L.R.B. 1355 (1939) 26, 27
American-Hawaiian Steamship Company, 19 N.L.R.B. 623 (1940) 26, 28
American Petroleum Co., 12 N.L.R.B. 688 (1939) .. 5
Arkwright Corp., 36 N.L.R.B. 687 (1941) 22
Armour & Co., 15 N.L.R.B. 268 (1939) 9

Baer Bros., 43 N.L.R.B. 1267 (1942) 14
Bell Telephone Laboratories, 55 N.L.R.B. 87 (1944) 25

PAGE

Blue Bell-Globe Mfg. Company, 22 N.L.R.B. 961 (1940) 10
Bohannon Tobacco Co., F.M., 37 N.L.R.B. 526 (1941) 22
Brown Shoe Company, 22 N.L.R.B. 1080 (1940) 6
Bryce Brothers Co., 34 N.L.R.B. 255 (1941) 11
Burton-Dixie Corp., 37 N.L.R.B. 432 (1941) 13

Chrysler Motor Corp., 44 N.L.R.B. 881 (1942) 26
Clifton Mfg. Company, 9 N.L.R.B. 13 (1938) 8
Colorado Portland Cement Co., 45 N.L.R.B. 197 (1942) 24
Commonwealth Edison Co., 55 N.L.R.B. 732 (1944) 25
Consumers' Power Co., 9 N.L.R.B. 742 (1938) 18
Continental Mills, 30 N.L.R.B. 82 (1941) 20
Coos Bay Lumber Co., 14 N.L.R.B. 1206 (1939) 9

Diamond Crystal Salt, 37 N.L.R.B. 481 (1941) 22
duPont deNemours & Company, E. I., 69 N.L.R.B. 509 (1946) 15

Eagle Oil and Refining Company, 27 N.L.R.B. 1003 (1940) 7
Edwards Valve & Mfg. Company, The, 38 N.L.R.B. 428 (1942) 23
Electric Auto-Lite Co., The, 9 N.L.R.B. 147 (1938) 17

Farmington Shoe Mfg. Company, 41 N.L.R.B. 169 (1942) 7
Farrar & Trefts, Inc., 44 N.L.R.B. 678 (1942) 15
Fink and Sons Co., Inc., A., 9 N.L.R.B. 441 (1938) 17
Flintkote Co., 42 N.L.R.B. 929 (1942) 23
French Paper Company, 22 N.L.R.B. 1054 (1940) 6
Fruit Growers' Supply Co., 36 N.L.R.B. 959 (1941) 12

General Chemical Co., 31 N.L.R.B. 413 (1941) 21
Gettysburg Furniture Co., 25 N.L.R.B. 1109 (1940) 6

PAGE

Gibbs Gas Engine Co., 42 N.L.R.B. 272 (1942) 7
Gluck Bros. Inc., 45 N.L.R.B. 1159 (1942) 24
Goodrich Electric Co., Inc., 30 N.L.R.B. 979 (1941). 21
Gutmann and Company, Inc., 30 N.L.R.B. 1 (1941). 10

Hamrick Mills, 44 N.L.R.B. 238 (1942) 24
Hawthorne Paper Company, 12 N.L.R.B. 43 (1939) 9
Holland-Rieger Division, Apex Electric Co., 6 N.L.R.B. 156 (1938) 16
Houde Engineering Corp., 36 N.L.R.B. 587 (1941). 22

Ideal Seating Co., 36 N.L.R.B. 166 (1941) 12
Illinois Knitting Co., 11 N.L.R.B. 48 (1939) 18
Indiana Brass Company, 36 N.L.R.B. 967 (1941).. 12

Jerry and Edythe Belanger, 32 N.L.R.B. 1276 (1941) 11
John Yasek, 37 N.L.R.B. 156 (1941) 12
Jones & Laughlin Steel Corporation, 52 N.L.R.B. 975 (1943) 34

Kelsey-Hayes Wheel Co., 16 N.L.R.B. 580 (1939). 9

LaPlant-Choate Mfg. Company, 13 N.L.R.B. 1228 (1939) 5
Lee Rubber and Tire Corporation, 24 N.L.R.B. 1077 (1940) 19
Lehon Co., The, 34 N.L.R.B. 313 (1941) 1
Libbey-Owens-Ford Glass Company, 10 N.L.R.B. 1470 (1939) 5
Libbey-Owens-Ford Glass Company, 31 N.L.R.B. 243 (1941) 10
Lincoln Mills of Alabama, 9 N.L.R.B. 778 (1938).. 9
Link-Belt Speeder Company, 37 N.L.R.B. 889 (1941) 13

PAGE

Little Rock Furniture Mfg. Co., 39 N.L.R.B. 892 (1942) 23
Lookout Oil and Refining Co., 42 N.L.R.B. 560 (1942) 23
Luckenbach Steamship Co., 2 N.L.R.B. 181 (1936) 19, 26
Luders Marine Construction Co., 44 N.L.R.B. 214 (1942) 15
Luscombe Airplane Corp., 69 N.L.R.B. 479 (1946) .. 25

MacAndrews & Forbes Co., 39 N.L.R.B. 699 (1942) 13
Mack-International Motor Truck Co., 31 N.L.R.B. 424 (1941) 10
Mary Leila Cotton Mills, Inc., The, 30 N.L.R.B. 238 (1941) 10
Maryland Dry Dock Co., 49 N.L.R.B. 633 (1943) ... 31
McDonald Chocolate Company, J. G., 5 N.L.R.B. 547 (1938) 5
McKesson & Robbins, Inc., 42 N.L.R.B. 1297 (1942) 14
Merrimack Mfg. Co., 9 N.L.R.B. 173 (1938) 17
Moulton Ladder Mfg. Company, 27 N.L.R.B. 40 (1940) 6
Moulton Ladder Mfg. Company, 31 N.L.R.B. 665 (1941) 11

National Copper and Smelting Co., The, 30 N.L.R.B. 973 (1941) 20
Naumkeag Steam Cotton Co., 13 N.L.R.B. 513 (1939) 19
Newark Rivet Works, 18 N.L.R.B. 520 (1939) 9
New Indiana Chair Co., 43 N.L.R.B. 318 (1942) 14
North Carolina Finishing Co., 44 N.L.R.B. 681 (1942) 24

PAGE

Ohio Brass Company, The, 13 N.L.R.B. 72 (1939) .. 9

Pacific Gas & Electric Co., 40 N.L.R.B. 591 (1942) .. 14
Pacific Mills, Cocheco Division, 10 N.L.R.B. 26 (1938) 18
Peerless Novelty Company, 37 N.L.R.B. 622 (1941) 13
Philip Carey Mfg. Co., 39 N.L.R.B. 769 (1942) 13
Pullman-Standard Car Mfg. Co., 29 N.L.R.B. 600 (1941) 20

Quaker Oats Company, The, 32 N.L.R.B. 312 (1941) 21

Republic Creosoting Co., 40 N.L.R.B. 615 (1942) .. 14
Rickert Rice Mills, Inc., 27 N.L.R.B. 466 (1940) 6
Robins Dry Dock & Repair Co., 33 N.L.R.B. 15 (1941) 21

Saticoy Lemon Association, 28 N.L.R.B. 1214 (1941) 10
Sculler Safety Corp., 36 N.L.R.B. 1160 (1941) 12
Shaw Lumber Company, 28 N.L.R.B. 818 (1940) .. 10
Singer Manufacturing Co., 8 N.L.R.B. 434 (1940) .. 5
Solvay Process Co., 29 N.L.R.B. 24 (1941) 20
Solvay Process Co., 30 N.L.R.B. 264 (1941) 7
South Portland Shipbuilding Corp., 39 N.L.R.B. 485 (1942) 13
Southern Cement Co., 28 N.L.R.B. 596 (1940) 19
Steiner, A. P., 43 N.L.R.B. 1384 (1942) 15
Sullivan Mining Company, 36 N.L.R.B. 107 (1941) 12
Superior Coach Corp., 39 N.L.R.B. 926 (1942) 14
Sweet Candy Company, 5 N.L.R.B. 541 (1938) 5

Theurer Wagon Works, Inc., 18 N.L.R.B. 837 (1939) 6

PAGE

Trojan Powder Co., 29 N.L.R.B. 229 (1941) 20
Tucker Duck and Rubber Co., 36 N.L.R.B. 132 (1941) 12
Turner Day & Woolworth Handle Co., 33 N.L.R.B. 1220 (1941) 11

Vanadium Corporation of America, 13 N.L.R.B. 836 (1939) 9

Westinghouse Airbrake Company, 4 N.L.R.B. 403 (1937) 4
Westinghouse Electric & Mfg. Company, 23 N.L.R.B. 521 (1940) 19
Westinghouse Electric & Mfg. Company, 32 N.L.R.B. 274 (1941) 21
West Kentucky Coal Company, 24 N.L.R.B. 863 (1940) 6
Whiterock Quarries, Inc., 33 N.L.R.B. 145 (1941) .. 11
Willys-Overland Motors, Inc., 9 N.L.R.B. 924; 10 N.L.R.B. 160 (1938) 18

Supreme Court of the United States

OCTOBER TERM, 1946

NO. 418

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

JONES & LAUGHLIN STEEL CORPORATION, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

SUPPLEMENT TO BRIEF FOR RESPONDENT.

I. Purposes of This Supplemental Brief.

At the hearing of this case, on March 7, 1947, the Court granted the respondent leave to file this Supplement to its printed brief, in support of two propositions advanced in its oral argument.

1. *To resolve a seeming contradiction, raised by the opposing briefs, concerning the Board's decisions in cases involving "watchmen" between 1935 and 1942.*

One of the respondent's two propositions related to an apparent contradiction between the assertion made at page 59 of its brief that:

> "From 1935 until 1942, * * * the Board invariably classified police officers having duties of the character * * * described in this record, as agents of management, who must be excluded from the jurisdiction of rank and file unions. * * *"

—on the one hand, and, on the other, the assertion, made in the Labor Board's printed brief, elaborated in its oral argument and documented by a list of 106 election orders made by the Board between 1937 and 1944, to the effect that (Board's brief, p. 47):

> "The * * * Board, in more than a hundred cases, has expressly included guards or watchmen in units of production and maintenance employees."

In oral argument the respondent stated that its examination of the Board's reports of the 106 cases, so listed on pages 47-50 of the Board's brief, had shown that the Board's assertion was not in fact a contradiction of the respondent's argument: that the Board's list had included many cases in which no question of drawing a line between management and labor had been raised, considered or decided; and that, although the list included cases involving many other kinds of "watchmen," no such case, decided before 1943, referred to or decided the status under the National Labor Relations Act of police officers having duties of the character de-

scribed in this record, and stipulated by the Board. The first purpose of this Supplemental Brief is to furnish a digest of the cases on the Board's list, which is intended to support the Respondent's assertions.

2. *To show that the respondent's present contention, that a single union cannot represent both rank and file labor and agents of management, was raised before the Board.*

The second and other purpose of this paper is to furnish references, more particular and specific than those contained in the original Brief for Respondent, to the points in the Board's own record of the case which show that the respondent raised before the Board the contention (one of those on which it relies here, and one not raised in the *Packard Motor Car Co.* case) that no single labor union can, under the Act, command recognition as exclusive representative of both the rank and file labor in a steelworks, and, at the same time, of policemen or foremen or any of the other agents through whom the authority of management is expressed and enforced as against the rank and file.

II. The Cases Cited by the Board Do Not Refute the Respondent's Contention That, Prior to 1943, the Board Excluded Policemen of the Kind Here Involved from the Jurisdiction of Rank and File Labor Unions.

1. THE BOARD'S LIST OF 106 CASES.

(a) CASES IN WHICH THE POINT INVOLVED HERE WAS NOT RAISED BY THE EMPLOYER OR CONSIDERED BY THE BOARD.

In nineteen of the 106 cases on the Board's principal list, the Board's inclusion of "watchmen" in bargaining or voting units of rank and file labor was taken as a matter of course by the employers, and the question here involved was not considered by the Board. Only one of these cases involved what the Board calls "deputized" guards: that of the *Solvay Process Company*, No. 17, *infra*, in which three guards, evidently night watchmen, held police commissions. As policemen, these three apparently dealt with the general public, rather than with rank and file labor. There is no reason to believe that any of the "watchmen" in any of the nineteen cases was called upon to enforce any rule or policy of management against rank and file workers. The nineteen cases are the following:

1. *Westinghouse Airbrake Company*, 4 N.L.R.B. 403 (1937). A force of twenty-five or thirty "watchmen" were permitted to vote in a unit including a much large number of rank and file laborers, in a rather large manufacturing plant, located in a populous suburban district. The "watchmen," unlike the police in this case, were neither guards nor police officers, were not armed, had no municipal or official status, and had no supervisory, monitorial or managerial relation to the rank

and file. They were stationed at gates and maintained a fire patrol.

2. *Sweet Candy Company,* 5 N.L.R.B. 541 (1938). A few "watchmen" were permitted to vote in a Board election, with other rank and file employees in a small candy factory. They were probably night watchmen; but their duties are not described, except to show that they were not "supervisory." The Board accepted (p. 544) the parties' view of their status.

3. *J. G. McDonald Chocolate Company,* 5 N.L.R.B. 547 (1938). In another small candy factory, a few "watchmen" were included in a "unit" of rank and file labor, as in the preceding case.

4. *Singer Manufacturing Co.,* 8 N.L.R.B. 434 (1940). "Watchmen" were included in a unit of 890 rank and file workers in a plant devoted to the manufacture of sweepers. The numbers and duties of the "watchmen" are not described, except that the Board's decision states that they resembled those of the rank and file laborers in the "unit."

5. *Libbey-Owens-Ford Glass Company,* 10 N.L.R.B. 1470 (1939). "Watchmen" were included, without discussion, in the rank and file "unit" in window glass manufactories. The report discloses neither their numbers nor their duties.

6. *American Petroleum Co.,* 12 N.L.R.B. 688 (1939). "Watchmen" were treated as members of the rank and file in a small oil refinery, without any disclosure of their numbers or duties.

7. *LaPlant-Choate Mfg. Company,* 13 N.L.R.B. 1228 (1939). A few "watchmen"—numbers and duties

not stated—were included without discussion in a rank and file "unit" of 320 individuals employed in a small plant building heavy machinery.

8. *Theurer Wagon Works, Inc.*, 18 N.L.R.B. 837 (1939). Night watchmen — having no managerial authority—were included without comment in the rank and file unit in small automotive body repair shops.

9. *French Paper Company*, 22 N.L.R.B. 1054 (1940). A small group of "watchmen" in a paper mill were included without discussion in a rank and file election "unit" of 116 laborers.

10. *Brown Shoe Company*, 22 N.L.R.B. 1080 (1940). The "watchmen" in a shoe manufacturing plant were treated as rank and file labor, without discussion or disclosure of their numbers or duties.

11. *West Kentucky Coal Company*, 24 N.L.R.B. 863 (1940). The "watchmen" on an inland river coal dock were included, without any discussion, in an election "unit" of seventeen longshoremen.

12. *Gettysburg Furniture Co.*, 25 N.L.R.B. 1109 (1940). The "watchmen"—duties not disclosed—in three small furniture factories were, without discussion, treated as rank and file labor, for the purposes of an election. It appears that they had previously been represented by the rank and file union.

13. *Moulton Ladder Mfg. Company*, 27 N.L.R.B. 40 (1940). "Watchmen" were included, without discussion, in an election "unit" of the 63 rank and file laborers employed in a small wood-working shop.

14. *Rickert Rice Mills, Inc.*, 27 N.L.R.B 466 (1940). The "watchmen" in a rice-processing plant

were included, without any discussion in an election "unit" of 113 rank and file laborers.

15. *Eagle Oil and Refining Company*, 27 N.L.R.B. 1003 (1940). Two "watchmen" in a small oil refinery were, without disclosure of their duties, treated as rank and file labor, for the purposes of an election.

16. *American Cyanimid Co.*, 27 N.L.R.B 1176 (1940). "Watchmen" in a chemical plant were included in a rank and file unit of 174 men, without any discussion, in an election order.

17. *Solvay Process Company*, 30 N.L.R.B. 264 (1941). Of a small group of laborers classified as "watchmen" in a small stone quarry in Trenton, New Jersey, three were commissioned as special city policemen. They and the others in the group had other duties, such as the work of servicing steam shovels, at nights and during week-end shutdowns. It does not appear that they had any duty of control over rank and file labor; instead, the report suggests that their police status was a precaution against injuries to or by trespassers upon the quarry premises, during off hours. No party objecting, they were included in a rank and file election "unit."

18. *Farmington Shoe Mfg. Company*, 41 N.L.R.B. 169 (1942). The "watchmen" in a shoe factory were included in a rank and file election "unit," without disclosure in the decision of their numbers or duties.

19. *Gibbs Gas Engine Co.*, 42 N.L.R.B. 272 (1942). The "watchmen" in a shipyard were treated as rank and file labor in an election case, without discussion of their numbers or duties. The employer had previously recognized a union as their representative.

(b) CASES IN WHICH ALL PARTIES STIPULATED THAT THE BOARD SHOULD TREAT "WATCHMEN" AS RANK AND FILE LABOR.

In forty-seven of the Board's collection of 106 cases, the parties stipulated, and so urged upon the Board, that the individuals described as watchmen should be treated as members of the rank and file.

In the Board's reports of these cases, the duties of the "watchmen" are rarely discussed. This is to be expected, for the stipulations of the parties were intended to avoid any discussion, and to indicate that it was wholly unnecessary. But such circumstances as are disclosed by the reports, all show that the "watchmen" in these forty-seven cases were never subject to be considered as essential agents of managment in its dealings with the rank and file. In a large majority of the forty-seven cases, they were merely night watchmen, usually employed in very small shops or factories, whose work was done at times when the rank and file were absent, and when it was necessary only to guard the employer's premises against fires and trespassers. None of these cases involved "deputized" watchmen, or men having any public duties, as police or otherwise. The cases are as follows:

20. *Clifton Mfg. Company,* 9 N.L.R.B. 13 (1938). "Watchmen" were treated as rank and file labor in a cotton mill election case. Their numbers and duties are not disclosed.

21. *Alaska Juneau Gold Mining Co.,* 9 N.L.R.B. 755 (1938). "Watchmen"—numbers and duties undisclosed —were treated as rank and file labor in a gold mine election.

22. *Lincoln Mills of Alabama,* 9 N.L.R.B. 778 (1938). "Watchmen" in a cotton mill were permitted to vote in a rank and file election—their numbers and duties are not given.

23. *Hawthorne Paper Company,* 12 N.L.R.B. 43 (1939). "Watchmen" in a small paper mill were included in a rank and file election "unit." No further details are disclosed.

24. *The Ohio Brass Company,* 13 N.L.R.B. 72 (1939). "Watchmen"—numbers and duties not disclosed—were included in a rank and file election "unit" in a small pottery.

25. *Vanadium Corporation of America,* 13 N.L.R.B. 836 (1939). Four "watchmen" in a small steel tool plant were included by agreement in a "unit" certified by the Board. Their duties were not described.

26. *Coos Bay Lumber Co.,* 14 N.L.R.B. 1206 (1939). "Watchmen" were included in a rank and file unit of 430 men, in a lumber yard election. Their numbers and duties were not described.

27. *Armour & Co.,* 15 N.L.R.B. 268 (1939). "Watchmen" were included, without any discussion, in a rank and file "unit" of 620 men in an abattoir.

28. *Kelsey-Hayes Wheel Co.,* 16 N.L.R.B. 580 (1939). "Watchmen" in an auto parts plant were included, without discussion of their duties or numbers, in a rank and file election. In prior years, the rank and file union had represented them.

29. *Newark Rivet Works,* 18 N.L.R.B. 520 (1939). Although they had been excluded by an earlier order of the Board, the "watchmen' in a small hardware manu-

factory were included in a rank and file election "unit" at the request of all parties.

30. *Blue Bell-Globe Mfg. Company,* 22 N.L.R.B. 961 (1940). "Watchmen" in a shop manufacturing garments were included in a rank and file election "unit" without any discussion of their numbers or duties.

31. *Shaw Lumber Company,* 28 N.L.R.B. 818 (1940). "Watchmen" on a timber tract were included in a rank and file election "unit" of 246 men, without any discussion of their numbers or duties.

32. *Saticoy Lemon Association,* 28 N.L.R.B. 1214 (1941). "Watchmen" in a small fruit packing house were treated as rank and file labor, without discussion of their duties.

33. *Gutmann and Company, Inc.,* 30 N.L.R.B. 1 (1941). "Watchmen" were treated as rank and file labor in an election in a leather tannery. Nothing was said of their numbers or duties.

34. *The Mary Leila Cotton Mills, Inc.,* 30 N.L.R.B. 238 (1941). "Watchmen" employed at a cotton mill were included in a rank and file election "unit" of 312 individuals, without any description of their numbers or duties.

35. *Libbey-Owens-Ford Glass Co.,* 31 N.L.R.B. 243 (1941). "Watchmen"—evidently night watchmen—in a small glassworks were treated as members of the force of 134 rank and file laborers, for the purposes of an election, without any discussion.

36. *Mack-International Motor Truck Co.,* 31 N.L.R.B. 424 (1941). "Watchmen"—their numbers and duties not disclosed—were included in small election

"units" of "service employees," in six motor truck assembling plants.

37. *Moulton Ladder Mfg. Company,* 31 N.L.R.B. 665 (1941). In a second election in the small wood-working plant involved in case No. 13, *supra,* "watchmen" were included in a unit of 70 rank and file laborers, again without any discussion of their numbers or duties.

38. *American Cyanimid & Chemical Corp.,* 31 N.L.R.B. 883 (1941). "Watchmen" were included in a "unit" of the forty-two rank and file employees in a small chemical plant. Their numbers and duties were not discussed.

39. *Jerry and Edythe Belanger,* 32 N.L.R.B. 1276 (1941). "Watchmen" in a small shop making aluminum castings, were included without discussion in an election "unit" of the fifty-five rank and file employees.

40. *Whiterock Quarries, Inc.,* 33 N.L.R.B. 145 (1941). "Watchmen" at a quarry were treated as rank and file labor, in an election case, without discussion of their numbers or duties.

41. *Turner Day & Woolworth Handle Co.,* 33 N.L.R.B. 1220 (1941). Three "watchmen" employed in a small wood-working plant were included, without any comment, in an election "unit" of sixty-nine rank and file laborers.

42. *Bryce Brothers Co.,* 34 N.L.R.B. 255 (1941). Night watchmen in a plant making expensive glassware were included, without discussion of their numbers or duties, in a rank and file election "unit."

43. *The Lehon Co.,* 34 N.L.R.B. 313 (1941). "Watchmen" included without any statement of number

or duties in a unit of 108 production and maintenance employees in a roofing factory.

44. *Sullivan Mining Company,* 36 N.L.R.B. 107 (1941). "Watchmen"—their numbers and duties not specified—were included in an election "unit" of 309 employees of a zinc refining plant.

45. *Tucker Duck and Rubber Co.,* 36 N.L.R.B. 132 (1941). A few "watchmen," duties not specified, were included in an election "unit" of 79 rank and file laborers, employed in three small upholstery fabric factories.

46. *Ideal Seating Co.,* 36 N.L.R.B. 166 (1941). "Watchmen" were included without any discussion in a "unit" of the ninety-eight rank and file workers in a small theatre seat factory.

47. *Fruit Growers' Supply Co.,* 36 N.L.R.B. 959 (1941). "Watchmen" were included, without mention of their numbers and duties, in a "unit" of the 180 rank and file laborers in a small, fruit box factory.

48. *Indiana Brass Company,* 36 N.L.R.B. 967 (1941). "Watchmen" were included, without disclosure of their numbers or duties, in an election "unit" of the 225 rank and file employees in a small brass foundry.

49. *Sculler Safety Corp.,* 36 N.L.R.B. 1160 (1941). "Watchmen" were included without any discussion in a "unit" of the seventy or eighty rank and file employees, in a small factory, building life rafts.

50. *John Yasek,* 37 N.L.R.B. 156 (1941). "Watchmen" were included, without discussion, in a "unit" of the twenty-nine rank and file workers employed in a lumber operation in Oregon.

51. *Burton-Dixie Corp.*, 37 N.L.R.B. 432 (1941). "Watchmen" were included, without mention of their numbers or duties, in a rank and file election "unit" in a bedding manufactory.

52. *Peerless Novelty Company*, 37 N.L.R.B. 622 (1941). A "unit" of all hourly and piece rated employees, in a small factory, 100 to 129 in number, included "watchmen," who were not otherwise identified or discussed.

53. *Link-Belt Speeder Company*, 37 N.L.R.B. 889 (1941). "Watchmen," whose number and duties were not stated, were included in a "unit" of all of the 218 non-supervisory employees in a small machine-tool shop.

54. *South Portland Shipbuilding Corp.*, 39 N.L.R.B. 485 (1942). It was agreed by all parties, and so ordered by the Board, that a "unit" of "hourly paid production and maintenance workers" in a shipyard should include "guards and watchmen." The number and duties of these men were not stated.

55. *MacAndrews & Forbes Co.*, 39 N.L.R.B. 699 (1942). Being urged by the employer to do so, the Board included "watchmen," "laborer-watchmen" and "guards" in a "unit" of about 500 rank and file employees in a licorice extract plant. The decision carefully describes the men so included, as unarmed night watchmen and gate keepers, having no official or managerial authority.

56. *Philip Carey Mfg. Co.*, 39 N.L.R.B. 769 (1942). "Watchmen" employed by a toy or novelty manufacturer were included, without mention of their numbers or duties, in a "unit" of about 1,290 rank and file workers.

57. *Superior Coach Corp.*, 39 N.L.R.B. 926 (1942). "Watchmen" were included, without any statement of their numbers or duties, in a "unit" of rank and file laborers employed in an automotive bus body shop.

58. *Pacific Gas & Electric Co.*, 40 N.L.R.B. 591 (1942). "Watchmen" employed by a public utility company were included in a rank and file election. The report does not disclose their numbers or duties, but does show that the employer favored their inclusion, and that they had been included in the rank and file bargaining unit in the past.

59. *Republic Creosoting Co.*, 40 N.L.R.B. 615 (1942). "Watchmen" were included, without any statement of numbers or duties, in a "unit" of the eighty-seven rank and file employees in a small creosoting plant.

60. *McKesson & Robbins, Inc.*, 42 N.L.R.B. 1297 (1942). "Watchmen" were included, without any statement of their numbers or duties, in a unit of 120 warehouse employees. They had been included in rank and file labor contracts in the past.

61. *New Indiana Chair Co.*, 43 N.L.R.B. 318 (1942). Three "watchmen" were included, without any statement of their duties, in a unit of 108 production, maintenance and shipping employees in a small chair manufactory.

62. *Baer Bros.*, 43 N.L.R.B. 1267 (1942). "Watchmen" were included in a unit of 59 production and maintenance employees in a small paint factory. Previous labor contracts had included them with rank and file laborers.

63. *A. P. Steiner,* 43 N.L.R.B. 1384 (1942). Two "watchmen" neither deputized nor armed, both of whom also performed maintenance duties, were included in a unit of production and maintenance men in a small machine, tool and die shop.

64. *Luders Marine Construction Co.,* 44 N.L.R.B. 214 (1942). "Watchmen" and "plant guards" were included without any statement of number or duties in a unit of rank and file employees in a boat yard.

65. *Farrar & Trefts, Inc.,* 44 N.L.R.B. 678 (1942). "Watchmen" were joined, without any statement of numbers or duties, in a unit of 141 production and maintenance employees in a tank and boiler works.

66. *E. I. duPont deNemours & Company,* 69 N.L.R.B. 509 (1946). Fifteen "plant guards", neither armed, militarized nor deputized, and whose duties were not related to the control of the conduct of their fellow workers, were included in a rank and file election "unit" of a lacquer finish plant, in accordance with previous bargaining history in the plant. This case was decided after the Board had abandoned its original line between management and labor.

(c) CASES IN WHICH THE BOARD'S ACTION WAS CONTESTED.

In the remaining forty of the Board's list of 106 cases, the proposed inclusion of "watchmen" in rank and file election units was the subject of contest by some party or parties, and so of particular comment or explanation by the Board.

Because the status of the "watchmen" involved in these forty cases was the subject of question or contro-

the Board's reports usually describe their duties in more detail that that supplied by the reports of the preceding cases, in which the matter of status was not reached for consideration. The descriptions show that in none of the forty cases were the "watchmen" charged with managerial or public duties of the characters imposed on the Jones & Laughlin Steel Corporation's Otis Works police. In almost all of the forty cases, the men involved were simple, unarmed night watchmen. In two cases: No. 74, *infra, Willys-Overland Motors, Inc.* and No. 81, *infra, Solvay Process Co.*, they were deputized—or some of them were; but in neither case were their duties, as the Board describes them, similar in any material respect to those of the Otis Works police.

These forty cases, as a group, are in point here only because they maintain, in a left-handed way, the contention here relied upon by the respondent: in each case where the least occasion existed, the Board justified its inclusion of "watchmen" in rank and file "units" by showing the absence of any regular duty to exercise managerial or public authority over the rank and file. The cases are the following:

67. *Holland-Rieger Division, Apex Electric Co.*, 6 N.L.R.B. 156 (1938). A few "watchmen" employed in a small electric appliance factory were included in an election "unit" of 367 rank and file employees, with the assent of two unions, and against the employer's objection. The numbers and duties of the watchmen were not stated, but it appears that they discharged no managerial function, as against rank and file labor. The decision turned largely on the fact that one of the unions had represented them, or some of them, for more than a year.

68. *American Hair and Felt Co.*, 6 N.L.R.B. 648 (1939). Six or seven "watchmen" were included in a rank and file "unit" of 485 employees in a small plant making felt products, with the approval of two unions, and over the employer's objection. Their duties were those of night watchmen or gatemen, and involved no exercise of authority over the rank and file.

69. *Aluminum Ore Co.*, 8 N.L.R.B. 914 (1938). Nineteen "watchmen" and "gatemen" at an alumina refining plant were included in a rank and file certification. It does not appear that they were armed or uniformed, or that they had any managerial duties or any official status.

70. *The Electric Auto-Lite Co.*, 9 N.L.R.B. 147 (1938). "Watchmen" were included in a rank and file election unit in an automobile parts plant, in reliance upon the decision in *re Luckenbach Steamship Co., Inc.*, 2 N.L.R.B. 181, a case to be discussed later in this brief. The report does not state their numbers or duties, but it does not appear that they had either managerial or official status.

71. *Merrimack Mfg. Co.*, 9 N.L.R.B. 173 (1938). "Watchmen" in a textile plant were included in a rank and file "unit." Their duties were those of night watchmen: to exclude trespassers, to watch for fires, to fire furnaces, and to switch lights off and on.

72. *A. Fink and Sons Co., Inc.*, 9 N.L.R.B. 441 (1938). "Watchmen" were included, over the employer's objection, in a rank and file "unit" of 303 employees in a small meat packing plant. The report contains no statement of their numbers or duties, but the circumstances indicate that they were night watchmen or gatemen.

73. *Consumers' Power Co.*, 9 N.L.R.B. 742 (1938). Janitor-watchmen employed in the power plants of a utility company were included in a rank and file "unit." Those employed in the company's offices were excluded. None of these men had any managerial duties or any official status.

74. *Willys-Overland Motors, Inc.*, 9 N.L.R.B. 924 and 937; 10 N.L.R.B. 160 (1938). In an effort to avert a strike of the 2,880 employees in the Toledo plant of this automobile manufacturer, the Board ordered an election, lumping in one "unit" with the rank and file workers certain foremen and assistant foremen, and also a group of thirty-seven watchmen, over the employer's objection. Of the "watchmen," the Board said, without further explanation, "They act as gatemen and night watchmen and some of them are deputy sheriffs or special policemen," and observed that the union in the case had long been recognized as their representative. It does not appear that these "watchmen" were responsible to enforce either company rules or public laws against the rank and file.

75. *Pacific Mills, Cocheco Division*, 10 N.L.R.B. 26 (1938). "Watchmen" were included in a "unit" of 1500 rank and file employees in a textile plant, over the employer's objection. They had no public status, and evidently no managerial or monitorial duties: they performed the work of night watchmen, plus "an amount of police service, principally when the plant is shut down."

76. *Illinois Knitting Co.*, 11 N.L.R.B. 48 (1939). Three "watchmen" were included in a "unit" of the 120 rank and file laborers in a small knitting mill, over the employer's objection. Their status and duties were in-

distinguishable, for this purpose, from those of other rank and file workers.

77. *Naumkeag Steam Cotton Co.*, 13 N.L.R.B. 513 (1939). "Watchmen" in a cotton mill and bleachery were included without any statement of their numbers or duties, in a unit of production employees where two unions desired their inclusion. Despite the Board's recognition that

> "* * * the position of the watchmen is such as to identify them somewhat more closely with the management than other employees, * * *"

it does not appear that these watchmen discharged any managerial or public functions.

This decision was based on *Luckenbach Steamship Company, Inc.*, 2 N.L.R.B. 181, a case to be discussed later in this brief.

78. *Westinghouse Electric & Mfg. Company*, 23 N.L.R.B. 521 (1940). "Watchmen" were included in a "unit" of the 147 rank and file employees of a small electric lamp factory. Their numbers and duties are not described, but the report implies that they had no managerial or public duties.

79. *Lee Rubber and Tire Corporation*, 24 N.L.R.B. 1077 (1940). Eight "watchmen" employed in an automobile tire manufactory were included in a "unit" of 791 rank and file employees. The report indicates that they had no managerial or public duties.

80. *Southern Cement Co.*, 28 N.L.R.B. 596 (1940). "Watchmen" in a cement plant were included in a "unit" of 125 rank and file employees. The report indicates that they had no public duties and no managerial

authority — that they were night watchmen and messengers.

81. *Solvay Process Co.*, 29 N.L.R.B. 24 (1941). "Deputized watchmen" in a chemical plant were included in a "unit" of 835 rank and file employees, at the instance of the employer and one labor union and over the objection of a second labor union. They were so included because they had been represented by the former union for over two years previously. It does not appear that any of their duties to the employer were incompatible with such representation, since no such question was raised by any party.

82. *Trojan Powder Co.*, 29 N.L.R.B. 229 (1941). Four "watchmen-guards," serving as gatemen and janitors, were included in a "unit" of 53 rank and file employees of a powder plant. They had no managerial or public authority or status.

83. *Pullman-Standard Car Mfg. Co. (Haskell and Barker Plant)*, 29 N.L.R.B. 600 (1941). Thirteen "watchmen" were included in a rank and file unit in a railroad car building plant. Their sole duties, as watchmen, were to protect the plant against fires and trespasses during shutdowns. They had no public status.

84. *Continental Mills*, 30 N.L.R.B. 82 (1941). Seven "watchmen," doing the work of gatemen and night watchmen, were included in a "unit" of 916 rank and file employees in a flour mill.

85. *The National Copper and Smelting Co.*, 30 N.L.R.B. 973 (1941). The two "watchmen" in a copper mill were included in a "unit" of 140 rank and file workers. Their duties were those of "yard labor."

86. *Goodrich Electric Co., Inc.*, 30 N.L.R.B. 979 (1941). The "watchmen" in a small electric supply factory were included in a "unit" of 230 rank and file workers. Their duties were those of maintenance laborers or caretakers.

87. *General Chemical Co.*, 31 N.L.R.B. 413 (1941). "Watchmen" whose only stated duty was handling dangerous chemicals were included at request of a union in a "unit" of 90 production and maintenance employees in a small chemical plant.

88. *Westinghouse Electric & Mfg. Company*, 32 N.L.R.B. 274 (1941). Five "watchmen" in a small electric supply manufactory were included in a rank and file "unit" of about 400 men, over the employer's objection. Although their duties are not described, the Board's report implies that they had no public or managerial status.

89. *The Quaker Oats Company*, 32 N.L.R.B. 312 (1941). The status of "watchmen" in the breakfast cereal factory involved in this case was not decided by the Board, nor were their numbers or duties described. Three unions presented different plans to the Board, the employer accepted neither proposal, and the Board determined to reserve its decision pending the outcome of a series of elections.

90. *Robins Dry Dock & Repair Co.*, 33 N.L.R.B. 15 (1941). Without stating their numbers, the Board included watchmen in a rank and file unit, although one labor union and the employer objected. The Board said:

> "*Watchmen* are engaged in tending gates, patrolling, ringing clocks, and in fire detection. They are hourly paid and not on the 'shape-up.'

Local 39 and the Association desire their inclusion and the Company and the Council their exclusion. We shall include them in the unit."

91. *Houde Engineering Corp.*, 36 N.L.R.B. 587 (1941). As in case No. 90, the employer and one union objected, but the Board included "watchmen" in a rank and file "unit." The report does not describe the "watchmen's" duties or status, except to say that:

> "There are 22 watchmen consisting mostly of elderly or disabled men formerly employed by the Company in other positions. They are included in the present contract between the Company and the Association and have been included in previous contracts with the Association over a period of 8 years. In the light of this established bargaining practice, we shall include the watchmen in the appropriate unit."

92. *Arkwright Corp.*, 36 N.L.R.B. 687 (1941). Although the employer and one union objected, "watchmen" in a textile plant were included in a rank and file "unit." Their numbers and duties were not stated, but it appears that they can have had no managerial authority or public status.

93. *Diamond Crystal Salt*, 37 N.L.R.B. 481 (1941). Six "watchmen" in a salt works were included in a "unit" of 317 rank and file workers over the employer's objection. The report shows that they were night watchmen, having no duty to control the rank and file and no public status.

94. *F. M. Bohannon Tobacco Co.*, 37 N.L.R.B. 526 (1941). This case resembles No. 93, in that the three "watchmen" included in the rank and file unit, over the

employer's objection, were employed to guard the plant, and to do certain maintenance labor, at night and on week-ends, when the other rank and file workers were not present. They had no public status.

95. *The Edwards Valve & Mfg. Company,* 38 N.L.R.B. 428 (1942). In this case the Board included in a rank and file unit of 190 men, over the employer's objection, a small class of night watchmen-janitors having no managerial or public responsibilities.

96. *Little Rock Furniture Mfg. Co.,* 39 N.L.R.B. 892 (1942). In this case, as in the two preceding cases, the "watchmen," included in a rank and file unit against the employer's objection, were employed simply to exclude trespassers and to keep fires during night and week-end shutdowns; and had no duties to control the rank and file or to enforce the law.

97. *The American Brake Shoe and Foundry Co.,* 41 N.L.R.B. 82 (1942). This case involved three night watchmen like those of the three preceding cases: men having no public or supervisory duties, not armed or uniformed, not trained as police, and not entrusted with any confidential duties. Only 77 men were in the unit.

98. *Lookout Oil and Refining Co.,* 42 N.L.R.B. 560 (1942). In this case, again, the "watchmen" were typical night watchmen having no public or supervisory duties, employed in a cotton seed oil plant. They were included in the rank and file "unit" of 137 men, with the employer's approval, but over the objections of both of the competing labor unions.

99. *Flintkote Co.,* 42 N.L.R.B. 929 (1942). "Watchmen" employed in a roofing manufactory were included in a "unit" of 330 rank and file workers over

the employer's objection. Their duties were those of night watchmen—to exclude trespassers and detect fires, and included no managerial authority or public responsibility. They had previously been represented by the union. At request of the Government three men had been deputized but no material change in their duties was effected thereby.

100. *Hamrick Mills*, 44 N.L.R.B. 238 (1942). Seven "watchmen" in a cotton mill were included in a "unit" of 381 rank and file workers over the employer's objection. The report shows that they had no duty to enforce company rules and no public status. They were, it appears, simply armed night watchmen.

101. *North Carolina Finishing Co.*, 44 N.L.R.B. 681 (1942). "Watchmen" employed in a cotton goods mill were included in a rank and file "unit" with the employer's approval, but over the objection of the union. They were night watchmen and gatemen, and were included accordingly because, as the Board observed, "their duties appear to be those customarily performed by watchmen rather than those of a specialized plant protection force."

102. *Colorado Portland Cement Co.*, 45 N.L.R.B. 197 (1942). In this case, as in the several preceding cases, the three "watchmen," in a cement mill, were included in a "unit" of approximately 136 rank and file employees, because their duties were simply those of night watchmen. One union desired their inclusion; another union and the employer objected.

103. *Gluck Bros. Inc.*, 45 N.L.R.B. 1159 (1942). Four "watchmen" employed to guard a furniture plant against intruders and fires, during nightly shutdowns—night watchmen, having no managerial or public au-

thority—were included in a rank and file unit of 165 men against the employer's objection.

104. *Bell Telephone Laboratories,* 55 N.L.R.B. 87 (1944). This case, and Nos. 105 and 106, *infra,* are unimportant to the respondent's argument, because they were decided since the Board's abandonment, in 1943, of its original interpretation of the Act. Apart from that, this case is of no support to the Board's argument, for the Board dismissed the petition without passing upon the status of the watchmen.

105. *Commonwealth Edison Co.,* 55 N.L.R.B. 732 (1944). In this case the employer's petition sought the inclusion of a force of demilitarized plant guards in a rank and file unit. It does not appear that the guards had any managerial status: they were either gate watchmen, or men engaged in patrolling an electric power system in radio-equipped automobiles, to prevent damage by trespassers; and they had no public status after their demilitarization.

106. *Luscombe Airplane Corp.,* 69 N.L.R.B. 479 (1946). In this very recent case, seven watchmen in an airplane factory were included in a rank and file "unit" against the employer's opposition. They had no public status, and no managerial or monitorial duties, it appears, except to check packages at the plant gates.

2. THE OTHER LISTS OF CASES REFERRED TO IN THE BOARD'S ARGUMENT.

In the Board's oral argument, it was stated generally that the list of 106 cases, which have been digested, is reinforced by other lists submitted here and in the Court below at various stages of the case. But

the long list attached to the Board's petition for rehearing in the Court below (R. 107) and the long list attached to the Board's petition for certiorari at No. 1237 October Term, 1944, are not in point at present, because they are simply catalogues of the decisions which followed chronologically the Board's decision, in the case of *Chrysler Motor Corporation,* 44 N.L.R.B. 881, published late in 1942, to depart from its long-standing adherence to the traditional rule of the managerial status of such policemen as are involved here. It is true also, as is observed in the Brief for Respondent, that in only a minor fraction of these cases — undoubtedly those in which the union status given the guards or watchmen was unimportant to the employer—has the Board's new rule been accepted by the parties concerned, and that in no cases prior to this one has the Board attempted by judicial process to enforce the new rule against anyone.

3. THE CASE OF THE LUCKENBACH STEAMSHIP COMPANY, 2 N.L.R.B. 181 (1936); 10 N.L.R.B. 1355 (1939); AND 19 N.L.R.B. 623 (1940).

To complete any discussion of the cases relied upon, in the Board's oral argument, to sustain its position that the Board has always treated plant guards and police as rank and file labor—and that there is, as a result, no room for application here of the doctrine of settled administrative construction—it is probably necessary to consider the Board's decisions in the case of the *Luckenbach Steamship Company, et al.*

The *Luckenbach* case was relied upon in the Board's oral argument, and two of the Board's three reports of it are described in some detail, on pages 58 and 59 of the Board's brief, as authorities for the Board's

proposition just described. But if the entire history of the case be considered, it will be seen that it does not, in the end, support the Board's view of the issue now under discussion.

In *Luckenbach Steamship Company,* 2 N.L.R.B. 181 (1936), the Board considered a petition of the International Longshoremen's Association for certification as exclusive representative of several large classes of individuals employed on the docks in San Francisco, by the owners of substantially all of the ocean-going steamship lines operating out of that port. Amongst the employees so claimed by the Union were "watchmen" of three classes. Each watchman was employed by some one steamship company; and it was the duty of watchmen in one of the three classes to patrol docks at which their employer's ships were moored, and to guard their employer's property against fires, and against thefts and other irregularities. Some of the watchmen in this class were special police officers of the City of San Francisco. The employers objected to their inclusion in the election "unit," on grounds resembling those here relied upon by the respondent Jones & Laughlin Corporation; but the Board nevertheless issued an election order which lumped them with the rank and file.

In *American-Hawaiian Steamship Company,* 10 N.L.R.B. 1355 (1939)—a further proceeding in the same case—it appeared that in the Board's election a majority of the voters had favored the I.L.A., the Union in the case; and that the Board had certified the Union as exclusive representative of the entire "unit." Some of the ship owners (principally those who had no need for the services of deputized policemen) had accepted the Board's certification, but the larger companies, those who

employed and relied upon the private municipal police, had refused to recognize the Union. The police themselves had intervened in the matter, reported their dissatisfaction with the Board's original plan, and sought to be released from the jurisdiction of the Union. The employers renewed their original objections. The Union contended that the desires of the police should be ignored, and that the Board's certification should be enforced. Although its Trial Examiner recommended the exclusion of the private policemen from the Union's jurisdiction, the Board, rejecting his recommendation, entered an order which commanded the employers to give full weight to the certification.

This report, considered by itself, might suggest—as the Board's brief indicates—that the Board had determined, for once and for all, to enforce the view that policemen must be treated as rank and file labor, in the establishment of appropriate units. That is not, however, the case. The Board's order was not observed in fact. The Board never attempted seriously to enforce it. And in

American-Hawaiian Steamship Company, 19 N.L.R.B. 623 (1940)—a report of the same case, not cited in the Board's brief here, the Board vacated and set aside its final order and dismissed the Union's complaint.

A reading of the three reports of the *Luckenbach* case will show that the policies and interpretations of the Act which it reflects are incompatible in many particulars with the principles asserted to be correct by the Board's brief here. The decision was anomalous from the beginning, and its abandonment and vacation by the

Board itself was very evidently a recognition or confession of error on the part of the Board.

III. The Respondent Raised Before the Board Its Present Contention That a Single Union Should Not Be Qualified as Exclusive Representative of Both the Police and the Rank and File, in the Otis Works.

At the first of the Board's two hearings of this case, held on April 8, 1943, the respondent was represented by Earl F. Blank, its Director of Personnel Relations (R. 2). Early in the hearing, as the only witness for the respondent, Mr. Blank read into the record a statement of its opposition to the Union's plan to represent the police (R. 5).

In his statement, he described the then effective contract of December 2, 1942, by which the Union had been recognized as exclusive representative of the entire body of rank and file labor in the Otis Works, and by which it had been agreed that foremen, "watchmen," salaried employees and nurses should be excluded from its jurisdiction (R. 5-6, and see R. 16). He declared that the respondent must be entitled, of necessity, to the single-minded loyalty of these representatives of management (R. 6):

> "These four groups occupy positions which by virtue of the character thereof necessarily render them perforce management representatives. It is evident from the above exclusions that the enumerated groups have interests so akin to that of the Corporation that it was, as late as December 11, 1942, the desire of both the Corporation and the

Union to have these people serve management's interest without other affiliation."

Having alluded to the military status of the police, he said (R. 8):

> "It is the position of this Corporation that the guards in question perform certain assigned work that is strictly representative of management, and for the reasons above assigned, it is respectfully requested that this petition be dismissed.
>
> "Trial Examiner Plost. As I understand you, you also at this time formally move to dismiss the Petition on the grounds that the unit of guards is not appropriate?
>
> "Mr. Blank. That's right."

In a second statement at the same hearing, Mr. Blank, plainly intending to illustrate his position, described an incident of divided loyalty, and resulting neglect of duty, in a plant policeman of the Bethlehem Steel Corporation (R. 11-12), its point being that no human being is likely to fulfill his obligations as such a policeman, and at the same time his obligations as a member of a rank and file union.

After the hearing, Mr. Blank filed with the Board, and it accepted as a brief (R. 52), a copy of the testimony of Joseph M. Larkin, Vice President of the Bethlehem Steel Company, submitted at a congressional hearing on April 1, 1943, and appearing on pages 161-172 in the pamphlet report of the "Hearings before the Committee on Military Affairs, House of Representatives, Seventy-Eighth Congress, First Session, on H.R. 2239, etc." The committee was considering legislation which would have prevented the union representation of supervisory agents—legislation which was shortly made

to appear unnecessary by the Board's decision of the *Maryland Drydock Company case*, (49 N.L.R.B. 633) on May 11, 1943, but which seemed most important when Mr. Larkin testified. The Committee record, filed with the Board by Mr. Blank, included the following, attributed to Mr. Larkin:

(p. 162)

"All that can be said about the inappropriateness of union membership for supervisory employees applies with even greater force when we come to consider plant guards. With the country at war, the men who guard vital steel plants, airplane factories, tank arsenals and shipyards have a grave responsibility, indeed. As you gentlemen are no doubt aware, plant guards are now members of the Auxiliary Military Police of the United States Army or the United States Coast Guard Reserve, and as such they are obligated to fulfill duties as prescribed by the President of the United States.

"Are these men to be permitted to join unions? And if they do join unions, will they not face a conflict of loyalties in the event of industrial disputes? Can a plant guard reasonably be expected to fulfill his responsibility to his employer, to faithfully patrol and protect the war production plant entrusted to his care, if his union orders him out on strike?

(p. 164)

"To further illustrate the effect of permitting the unionization of these employees, let us consider the position of the foremen. Suppose that these men who are the direct supervisors of the employees actually on the production front, join labor organ-

izations. They can either (1) joint the same union as employees, or (2) join some other union.

"If a foreman joins the same union as the men who work for him, the normal relationship between employees and management immedately disappears. When there is work to be done, someone has to direct it. It cannot be overstressed that to men in the ranks the foreman is the supervisor. When foremen join unions, supervision to a very real extent passes out of the picture."

In the Board's subsequent "Decision and Direction of Election," published on May 3, 1943, it recognized accurately the nature of Mr. Blank's objection, but nevertheless overruled it, in this language (R. 54):

"The Union already represents all production and maintenance employees of the Company under a contract dated December 2, 1942, and the employees in the unit proposed herein are specifically excluded from the benefits of the above-mentioned contract. However, the Union does not intend to merge the plant-protection employees with the unit for which it has already been recognized as the exclusive bargaining agent, but intends to bargain for them as a separate unit. We have, on several occasions heretofore, permitted the same labor organization to bargain for the production and maintenance employees and the plant-protection employees in separate units."

At the Board's second hearing in the case, held on September 28, 1943, after the election and a certification of the Union, the respondent was represented by James C. Beech, one of Mr. Blank's assistants (R. 41). Neither party offered any oral testimony, but Mr. Beech offered

several documents which plainly renewed Mr. Blank's objection. For example, he offered respondent's Exhibit 3-A, a communication to the Board which contained this language (R. 60):

> "The Corporation moved to dismiss the Petition because the Petitioner is the same labor organization that represents production and maintenance employes in all of its steel plants, * * *."

—saying, in response to a request by the Trial Examiner that he explain the significance of this Exhibit (R. 50):

> "* * * It is being introduced to clarify Respondent's present position in respect to bargaining with units composed of Plant Guards * * *."

Although the Trial Examiner was thus advised of the respondent's position, he made no express reference to it in his Intermediate Report, apparently considering that the question had been foreclosed by the Board's Decision and Direction of Election (R. 64). Nevertheless, in its exceptions to the Intermediate Report, the respondent complained of the Trial Examiner's ultimate conclusion of law—his conclusion that the Union was entitled to recognition, arguing that its application would result in a division of the loyalties of the police, of a character forbidden by the Act (R. 69):

> "* * * Plant guards, who are civilian auxiliaries to the military police, are confronted with mixed questions of duty, allegiance and responsibility to the U. S. Government, employer and labor organization. In the matter of The Maryland Drydock Company and Local No. 31 of the Industrial Union of Marine and Shipbuilding Workers of America, Cases No. R-5212 and 5214, the Board

held that supervisory employees do not constitute a unit appropriate for the purposes of collective bargaining * * *."

Finally, in the Board's Decision and Order, published on December 2, 1943—the final order now under review here, it expressly recognized and rejected the contention that a single union cannot represent both rank and file labor in such an establishment as the Otis Works, and also policemen who exercise managerial and public authority over the rank and file. Its language was general (R. 73):

"* * * The respondent has advanced no argument in support of its contentions which we have not considered and rejected in previous decisions holding that plant-protection employees may constitute appropriate units for collective bargaining under the Act."

—but its meaning was clarified by the Board's citation, as its authority for this ruling, of its own decision in a similar case arising at the respondent's Pittsburgh Works, *Jones & Laughlin Steel Corporation*, 52 N.L.R.B. 975 (1943), in which it had discussed and rejected the contention just described.

From the foregoing references to the record, it must be apparent that at every stage of the case before the Board, the respondent made clear its reliance *inter alia* upon the contention—later upheld by the Court below—that the Act forbids representation of both supervisory officers and supervised rank and file by one union.

Conclusion.

Although this Supplement to the respondent's Brief is laboriously long, its length results largely from the difficulties of digesting the Board's list of over one hundred cases, and of citing all the pages of the record at which the respondent is shown to have raised the contention of law just described, which the Board has recently (see R. 126-127) been unable to find in the case. It is hoped that, despite its length, this paper will tend to clarify the case, by showing — as it is submitted it does tend to show—that upon the facts set forth and the issues of law fairly presented by the record, this is a case of first impression, in which the Board has attempted improperly to depart from its own sound, and originally well-settled, administrative interpretation of the Act.

Respectfully submitted,

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 419

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

E. C. ATKINS AND COMPANY,
Respondent.

BRIEF OF RESPONDENT, E. C. ATKINS AND COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Filed December 10, 1946.

I N D E X

	Page
Corrected "Questions Presented"	2
Corrected "Statement"	7
Argument	18
1. There is no conflict because the holding in the Atkins case that those Auxiliary Military Police were not "employees" of Respondent resulted from a state of facts unlike that in the Jones & Laughlin case	18
2. There is no conflict because the fact that the guards were "employees" was not disputed in the Jones & Laughlin case	22
3. The Circuit Court of Appeals followed the Hearst case	23
4. There is no important issue to be decided by this Court	26
Conclusion	28

CITATIONS

Cases:

District of Columbia v. Sweeney, 310 U.S. 631	26
Layne & Bowler Corporation v. Western Well Works, Inc., 261 U.S. 387	19
NLRB v. Hearst Publications, Inc., 322 U. S. 111	23
NLRB v. Newport News Shipbuilding and Dry Dock Co., 308 U.S. 241	19
Walling v. Lum, 7 Wage Hour Reporter 570, 8 Labor Cases 66, 268 (S.D.Miss.). . . .	27
Wisconsin Electric Co. v. Dunmore Company 282 U. S. 813	18

Miscellaneous:

The Business of the Supreme Court at October Term, 1933, 48 Harvard LR 238	19

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BRIEF OF RESPONDENT, E. C. ATKINS AND COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Respondent, E. C. ATKINS AND COMPANY, respectfully prays that the petition of the National Labor Relations Board for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered on May 31, 1946 (*Atkins*, R. 322) be denied.

CORRECTED "QUESTIONS PRESENTED."

In place of the single question said to be presented by the *Atkins* case, on page 3 of the petition, there are actually two questions:

1. Are Auxiliary Military Police of the Army of the United States "employees" of Respondent within the meaning Section 2(3) of the National Labor Relations Act when:

(a) they never worked for Respondent in any other capacity;

(b) they were required by the Army of the United States to be enrolled to protect the plant internally and externally against *sabotage, espionage* and natural hazards, and *to serve with the Army* in time of disaster, internal disorders, *enemy action by air raid, fifth column activity, paratroop attack* or *invasion;*

(c) they were required to wear insignia prescribed by the Army because "by wearing such insignia or marks members serving with the Army will be recognized as *legitimate troops*" (Resp. Ex. 4, *Atkins*, R. 110);

(d) they are interviewed by Respondent, but are employed only when they are inducted, after investigation and approval by the Army, and after taking an oath of allegiance to the United States, agreeing to obey the orders of duly authorized officers, hearing the Articles of War read, and subjecting themselves to military law;

(e) they continue to be members of the Auxiliary Military Police until their resignations or dismissals are approved by competent military authority; the extreme authority of Respondent being to recommend dismissal, and to suspend without pay pending action on the recommendation;

(f) they receive all of their orders and instructions from the Army, such orders and instructions being received by the Chief Guard, and communicated by him to the individual guards;

(g) the Army has the right to exercise, and did exercise, complete control and direction over the manner and means in which they perform their duties;

(h) they are paid by checks of Respondent, which pays them because it is required to do so by the government.

2. If, under the facts set forth in question 1, such Auxiliary Military Police are "employees," was it, in December, 1943, inimical to the public welfare to require Respondent to bargain collectively with the representative of the majority of such Auxiliary Military Police with respect to rates of pay, wages, hours, and other conditions of employment?

The petition states the sole question to be as follows:

> "The question presented by the *Atkins* case is whether persons who are employed to guard the property of a private employer, who are compensated by that private employer at rates fixed by him, and who are also civilian auxiliaries to the military police of the Army of the United States, are 'employees' within the meaning of Section 2(3) of the National Labor Relations Act." (Petition, p. 3.)

The statements of fact contained in the question presented by the Board in the petition are not supported by the evidence. The evidence requires a finding that the facts were as stated in the first of the two corrected questions stated above.

The two chief errors in the Board's version of the question are (a) the statement that these persons "are employed to guard the property of a private employer"; and (b) the statement that they "are *also* civilian auxiliaries to the military police of the Army of the United States."

The fundamental error in these two statements is one which permeates the whole petition. It is a failure to understand the origin of the Auxiliary Military Police at the

Atkins plants and their mission and purpose. The Board assumes in its petition that these guards had been employees (not militarized) of Respondent; that as such they were "employees" within the meaning of Section 2(3) of the Act; that militarization was a status superimposed upon an existing employee relationship; and that the question is whether the addition of militarization deprives such guards of their pre-existing status as "employees."

There is no foundation in the evidence for this erroneous assumption. Yet the entire petition is founded upon it; and it is only this error which explains the Board's effort to join the *Atkins* and *Jones & Laughlin* cases as though they were similar in their facts.

The facts in the evidence are these: Before Respondent contracted to make armor plate for the Army, there was no plant guard force at the Atkins plant.[1] (*Atkins*, R. 88.) The guard force was established because the Army directed and required that it be done. It was not created as a non-militarized plant guard force employed by Respondent to guard its plant. It was created as a force of Auxiliary Military Police who were enrolled as such by the Army rather than being employed by Respondent. The guards were from their inception Auxiliary Military Police, and existed only because the Army needed them for a military purpose. They were not persons employed to guard private property who were "also" civilian auxiliaries to the military police. The implication of the word "also" of a military status added to an existing nonmilitary guard force is unsupported and contradicted by the evidence.

All of the evidence as to the purpose of the Auxiliary Military Police denies the description of them as "persons who are employed to guard the property of a private em-

1. Previously Respondent had four watchmen who occupied "pensioners' jobs"; were "employees"; but were not part of a plant guard force. (*Atkins*, R. 88; Atkins, Stip. p. 2.)

ployer." The War Department prescribed the mission of the Auxiliary Military Police as follows:

> "6. The mission of a guard force of Auxiliary Military Police is:
>
> (a) To provide interior and exterior protection of the plant against *sabotage* and *espionage* and natural hazards.
>
> (b) To *serve with the Army* in providing the protection to the plant and its environs in emergency situations.
>
> 7. An emergency situation in which the Auxiliary Military Police may be called upon for military service may arise from flood, conflagration, or other disaster; internal disorders hazardous to property or production important to the prosecution of the war; *protection from air raid; Fifth Column activity; paratroop attack or invasion;* or it may arise from any other condition or circumstances involving the plant or its community." (Resp. Ex. 4, *Atkins*, R. 106; Emphasis supplied.)

The direction to organize these Auxiliary Military Police forces came originally from the President as Commander-in-Chief:

> "1. Executive Order No. 8972, dated December 12, 1941, authorizes the Secretary of War and the Secretary of the Navy, 'to establish and maintain military guards and patrols, and to take other appropriate measures to protect from injury and destruction,' certain strategic premises, materials, and utilities. In accordance therewith the Secretary of War directed the military organization of plant guard forces as Auxiliary Military Police.
>
> 2. These guard forces will be organized as a civilian Auxiliary to the Military Police in all plants producing war material important in the war effort." (Resp. Ex. 4, *Atkins*, R. 105.)

It is not even accurate to say that these Auxiliary Military Police guarded solely private property. The Fall Creek Ordnance Plant was constructed by, and was the

property of, the United States (*Atkins*, R. 86, *Atkins*, Stip. p. 3) and the armor plate in both plants was being produced for the Army.

The Board in its petition has completely ignored the second question in this case, although there were two grounds for the judgment of the Seventh Circuit Court of Appeals. These were stated by that Court in its second opinion as follows:

> (1) "We formerly refused to enforce the Board's order on the ground that, since the alleged employees (plant guards) were militarized, they were not employees of respondent within the meaning of § 2(3) of the National Labor Relations Act."
>
> (2) "Alternatively, we held that even if the guards, despite their militarized status, be considered employees of respondent, enforcement of the Board's order 'should not be allowed • • • (because) to do so would be or is likely to be inimical to the public welfare." (*Atkins*, R. 321.)

As to the first ground, the Court said:

> "We have also given this matter further consideration and are of the opinion that our former decision in this respect was correct, and we reaffirm it." (*Atkins*, R. 321.)

As to the second, the Court said:

> "there is no necessity for decision on our part in this respect. This is so for the reason that the latter issue is immaterial in view of our decision that the plant guards were not employees." (*Atkins*, R. 321.)

The judgment of the Court, on May 31, 1946, was expressed as follows:

> "On consideration whereof, it is ordered and adjudged by this Court that the former judgment of this Court in this matter be reinstated for the reasons stated in our former opinion, filed February 27, 1945, and that the Board's motion for enforcement of its order be again denied." (*Atkins*, R. 322.)

CORRECTED "STATEMENT."

Following the usual proceedings under Section 9(c) of the Act, the Board issued a decision and direction of election finding that the plant guards involved were "employees" within the meaning of the Act, that they constituted an appropriate bargaining unit, and that they were entitled to the collective bargaining rights guaranteed by the Act, despite the fact that they were Auxiliary Military Police. (*Atkins*, R. 5-8.) The petitioning union was selected by a majority of the plant guards in the election and was certified by the Board as the representative of the plant guards. (*Atkins*, R. 17.)

Thereafter, in proceedings under Section 10(c) of the Act, the Board issued a decision in which it found that the Respondent had refused to bargain collectively with the certified representative of its plant protection employees, thereby engaging in unfair labor practices within the meaning of Section 8(5) and (1) of the Act. (*Atkins*, R. 30-42.) The Board ordered Respondent to cease and desist from refusing to bargain with the named representative of its plant protection employees; to cease and desist from engaging in any like or related acts or conduct interfering with, restraining or coercing the employees; upon request to bargain collectively with such representative; and to post appropriate notices. (*Atkins*, R. 32-33.)

The evidence relating to the Board's finding that these Auxiliary Military Police were "employees" within the meaning of Section 2(3) of the Act and entitled to exercise the bargaining rights guaranteed thereby may be summarized as follows:

In December 1943, when its refusal to bargain occurred

(*Atkins*, R. 39), Respondent was engaged in the manufacture of saws, tools and armor plate at its so called "main plant" in Indianapolis, Indiana, and of armor plate at the Fall Creek Ordnance Plant also in Indianapolis, Indiana. (*Atkins*, R. 277.) The main plant was owned by Respondent and its products were sold to jobbers, dealers, subcontractors and the United States Government. (*Atkins*, R. 277.) The Fall Creek Ordnance Plant was owned by the United States Government and operated by Respondent. All armor plate was manufactured for the United States Government. (*Atkins*, R. 88, 277; *Atkins*, Stip. p. 3).

Before Respondent began to produce armor plate it had no plant guard force, although it did have four watchmen at the Main Plant who occupied pensioners' jobs and were employees of Respondent. (*Atkins*, R. 88; *Atkins*, Stip. p. 2.) When Respondent entered upon war production the Army required that an Auxiliary Military Police force be established with a strength of sixty-four members covering both plants. (*Atkins*, R. 88-89.) Except for the four men who had been watchmen, none of the Auxiliary Military Police had ever been employed by Respondent before they became such Auxiliary Military Police.

The War Department described the purpose of the Auxiliary Military Police as follows:

> "The purpose of organizing the plant guard force is to increase the authority, efficiency, and responsibility of the guard forces at plants important to the prosecution of the war, and through military training to provide auxiliary forces throughout the United States *to supplement the Army* in wartime emergency situations." (Resp. Ex. 4, *Atkins*, R. 105-106, Emphasis supplied.)

It described their mission in these terms:

> "6. The mission of a guard force of Auxiliary Military Police is:

(a) To provide interior and exterior protection of the plant against *sabotage* and *espionage* and natural hazards.

(b) To *serve with the Army* in providing the protection to the plant and its environs in emergency situations.

7. An emergency situation in which the Auxiliary Military Police may be called upon for military service may arise from flood, conflagration, or other disaster; internal disorders hazardous to property or production important to the prosecution of the war; *protection from air raid; Fifth Column activity; paratroop attack or invasion;* or it may arise from any other condition or circumstances involving the plant or its community." (Resp. Ex. 4, *Atkins*, R. 106, Emphasis supplied.)

Applicants were enrolled in the Auxiliary Military Police as follows: They filled out application forms in Respondent's personnel office. (*Atkins*, R. 54, 68, 91.) These were submitted with the recommendation of Respondent to the Army (*Atkins*, R. 92.) The Army made an independent investigation of the applicant, who was enrolled only upon the Army's approval. (*Atkins*, R. 68, 71, 92). This was in accordance with the applicable War Department regulation:

" A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto." (Resp. Ex. 4, *Atkins*, R. 109.)

At the time a guard was enrolled, he was required to make, in writing and orally, an oath of allegiance to the Constitution, an agreement to obey any orders issued in connection therewith by the President, as Commander-in-Chief of the Army and Navy of the United States, and by his duly authorized officers, and an acknowledgment that

the appropriate Articles of War had been read and explained to him and that he was subject to military law. (Resp. Ex. 2, *Atkins*, R. 103-104, 54, 56 and 57.) This was required by the Army regulations. (Resp. Ex. 4, *Atkins*, R. 105.)

Each guard was issued an Auxiliary Military Police identification card by the Army (Resp. Ex. 3, *Atkins*, R. 104, 55, 69) which was not carried by Respondent's employees. (Atkins, R. 91.)

Auxiliary Military Police were subject to the Articles of War, especially Articles 58 (desertion), 61 (absence without leave), 62 (disrespect toward the President, Vice-President, Congress, Secretary of War, Governors and Legislatures), 63 (disrespect toward superior officer), 64 (assaulting or willfully disobeying superior officer), 66 (mutiny or sedition), 68 (quarrels, frays and disorders), 69-74 (arrest and confinement), 76 (subordinates compelling commander to surrender), 81 (relieving, corresponding with or aiding the enemy), 82 (spies), 83 (military property), 85 (drunk on duty), 88 (intimidation of persons bringing provisions), 89 (good order to be maintained and wrongs redressed), 90 (provoking speeches or gestures), 92 (murder and rape), 93 (various crimes), 94 (frauds against the government), 96 (general article), 104 (disciplinary powers of commanding officers), and 105 (redress of injuries to property). These are specified in the Army regulations (Resp. Ex. 4, *Atkins*, R. 106) and appear verbatim in the Record. (Resp. Ex. 9, *Atkins*, R. 117-155.)

Only the Army could terminate the tenure of a member of the Auxiliary Military Police. The authority of Respondent was limited to suspension pending action on a recommendation of dismissal.

> "25. A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army rep-

resentative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto. Inasmuch as the guards are under oath to the Army, the plant management may suspend a guard without pay pending approval of his dismissal by the District Plant Guard Officer and pending the termination of the guard's enrollment as a member of the Auxiliary Military Police." (Resp. Ex. 4, *Atkins*, R. 109.)

This was so in practice as well as in the regulations:

"Q. Whenever a man is discharged from the Military Police, who discharges him, the personnel office at E. C. Atkins and Compay or the Military?

A. The Military discharges him from the Auxiliary Military Police. Now there is one thing that should be said there. He can be relieved of his duty temporarily by myself or by E. C. Atkins and Company, problematically for breaking some rule or otherwise proving that he is not doing his duty; he could be relieved temporarily but he could not be discharged by E. C. Atkins and Company." (*Atkins*, R. 72.)

Q. Do you have the right to recommend them for promotion or discharge? Do you do that?

A. I recommend a man for discharge but I don't discharge him myself.

Q. You have the right to recommend him for discharge?

A. Yes, sir.

Trial Examiner Shroyer: While on the subject, to whom do you recommend?

The Witness: To Capt. Wetenhall, Cincinnati, who does the discharging.

Trial Examiner Shroyer: Who issues these two different types of terminations?

The Witness: He does; he issues those." (*Atkins*, R. 81.) (See also *Atkins*, R. 84, 89.)

The Army regulations provided some authority to plant management as to hiring and firing, where there was *a pre-existing plant guard force:*

24. Basically the militarization of the plant guard forces does not change the *existing* systems of hiring, compensation, and dismissal *except as stated in paragraph 25*. All remain, primarily, a matter between the guards and plant management. Guards in the employ of a private employer may, *as heretofore*, be dismissed and those who were Civil Service employees in the employ of the War Department may be dismissed by the local commanding officer, in accordance with Civil Service Regulations. In neither case is a Court Martial necessary." (Resp. Ex. 4, *Atkins*, R. 109, Emphasis supplied.)

(Paragraph 25 has been quoted *supra*).

Of course, paragraph 24 does not apply to Respondent, for Respondent had no plant guard force before the Army installed Auxiliary Military Police, so there was no "existing system" and there was no precedent for dismissing "as heretofore."

Respondent paid the wages of the Auxiliary Military Police. (*Atkins*, R. 82, 85) because "the Government makes them pay" (*Atkins*, R. 82) and made the necessary payroll deductions. (*Atkins*, R. 85.) There is no other evidence about where the ultimate burden of that payment fell. Respondent's counsel stated in argument before the Board "we do not operate on a cost-plus basis". (*Atkins*, R. 333.) But in that same argument he stated:

> "when you realize that the company is merely a conduit of that pay, made to pay it as a result of the contracts of the government, contracts which it was impossible to introduce in evidence because of the confidential nature of the product covered thereby. It will be seen that it is merely a technical incident and that in substance if is the government which is the paymaster of these troops." (*Atkins*, R. 332.)

The Army regulations contained the following provision, which obviously referred to plant guard forces which had

not originated as Auxiliary Military Police, and which therefore did not apply to this case:

> "27. The status of the employer in regard to the employee benefits for the guard force *is not changed.* For example, Social Security, Workmen's Compensation, Employer's Liability and vacation schedules *remain* unaffected. Employers should have a clear understanding with their insurance companies concerned." (Resp. Ex. 4, *Atkins*, R. 110, Emphasis supplied.)

The Auxiliary Military Police were armed (Atkins, R. 78) as they were required by the regulations to be. (Resp. Ex. 4, *Atkins*, R. 110.) They were required to wear distinctive insignia because:

> "By wearing such insignia or marks, members, serving with the Army, *will be recognized as legitimate troops* and not deemed irregulars or guerillas." (Resp. Ex. 4, *Atkins*, R. 110, Emphasis supplied.)

They were authorized to wear service stripes which "will be in accordance with Army Regulations" (Resp. Ex. 4, *Atkins*, R. 110) and "such decorations, service medals, ribbons, and badges as are authorized for wear on the United States Army service uniform". (Resp. Ex. 4, *Atkins*, R. 110.)

It is uncontradicted in the evidence that the Army had the right to exercise, and did exercise, complete control and direction over the manner and means in which the Auxiliary Military Police performed their duties. This was done through Captain Wetenhall, the Fifth Service Command, District Plant Guard Officer, Lieutenant Scanlon, his assistant, and Chief Johnston, of the Auxiliary Militar Police.

Chief Johnston had never been an employee of Respondent. (*Atkins*, R. 68.) He was enrolled directly in

the Auxiliary Military Police (*Atkins*, R. 68) as Chief (*Atkins*, R. 71).

The Auxiliary Military Police Chief received his orders from the Army (*Atkins*, R. 73, 83), was inspected by them, and could be removed from his authority by the Army (*Atkins*, R. 82.) He received no orders or instructions from Respondent and was not responsible or answerable to Respondent. (*Atkins*, R. 75, 78, 80, 82.)

> "Q. Do any of the Military Police under your command take any orders from any officer, director, or agent of the Atkins company as such?
>
> A. No; they wouldn't take any orders. Just like myself, they would cooperate in any way they could, but they would only—
>
> Q. Suppose such cooperation involved deviation from such specific order which you had to give. Would they follow your specific order or would they cooperate?
>
> A. They would—that would be their orders—to follow mine; yes, sir." (*Atkins*, R. 78.)

Chief Johnston worked "very closely" with Respondent's personnel director and testified that "I try to cooperate to the best of my ability and he does the same for me" (*Atkins*, R. 75) but he had never taken an order from the personnel director.

Chief Johnston, on his own authority, rotated the shifts of the Auxiliary Military Police, contrary to Respondent's system. (*Atkins*, R. 78-79.) He promoted members of Auxiliary Military Police to the rank of lieutenant without prior consultation, upon his own final authority, later notifying Respondent of their new rank. (*Atkins*, R. 82.)

Auxiliary Military Police were required to salute all Army officers. (Resp. Ex. 11, *Atkins*, R. 157.) This was enforced, and a guard was reprimanded by Captain Wetenhall for failure to salute him. (*Atkins*, R. 75.)

The *evidence* contains nothing directly on the subject of collective bargaining rights. The petition (pp. 12-13) refers to a War Department circular which is printed in Appendix B of the petition and which contains the statement "Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police." (Petition, App. B. p. 58.) This circular is not part of the record in this case, and there is nothing to indicate that either Respondent or the Auxiliary Military Police themselves had ever heard of it. The Board's failure to introduce it in evidence or refer to it in its decisions indicates that the Board had never heard of it either.

The union seeking to represent the Auxiliary Military Police was not the same union which represented the production and maintenance employees. (*Atkins*, R. 85-88.)

The Board found that the Auxiliary Military Police were "employees" of Respondent, that they were entitled to the collective bargaining rights under the Act, and that Respondent had committed an unfair labor practice, and ordered Respondent to bargain collectively with the union representing them. (*Atkins*, R. 31-32.)

The Circuit Court of Appeals for the Seventh Circuit denied the Board's petition for enforcement upon two grounds (*Atkins*, R. 348-366) which it later summarized as follows:

> 1. "We formerly refused to enforce the Board's order on the ground that, since the alleged employees (plant guards) were militarized, they were not employees of respondent within the meaning of § 2(3) of the National Labor Relations Act."
>
> 2. "Alternatively, we held that even if the guards, despite their militarized status, be considered

employees of respondent, enforcement of the Board's order 'should not be allowed * * *' (because) 'to do so would be or is likely to be inimical to the public welfare.'" (*Atkins*, R. 321.)

The Board petitioned for a writ of certiorari (No. 1238, October Term, 1944). In that petition the Board stated (as was not in the record) that the guards had been demilitarized and were no longer Auxiliary Military Police, but urged that this did not render the case moot. On June 4, 1945, this Court entered the following order:

> "*Per Curiam:* The petition for writs of certiorari is granted. The judgments are vacated and the cases are remanded to the respective United States Circuit Courts of Appeals for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof on the Board's orders." (325 U. S. 838.)

The Board and Respondent then entered into stipulations as to the alleged changed circumstances with respect to demilitarization. The Board filed with the Circuit Court of Appeals for the Seventh Circuit a motion for a decree enforcing its order. This was denied by that Court in the following terms:

> "We have considered the facts relative to the changed status of the plant guards by reason of their demilitarization and are of the opinion that they are irrelevant to the issues which we have heretofore decided adversely to the Board. Certainly such is the case with reference to our decision that the plant guards were not employees of respondent within the meaning of the Act. In fact, the irrelevancy of the changed circumstances as to this issue is conceded by the Board. We are urged by the Board, however, to reverse our former decision and to hold that the plant guards were employees. We have also given this matter further consideration and are of the

opinion that our former decision in this respect was correct, and we reaffirm it.

"Although we are doubtful that the facts concerning the demilitarization of the plant guards and their changed status as a result thereof are material to our alternative holding that the enforcement of the Board's order 'would be or is likely to be inimical to the public welfare,' there is no necessity for decision on our part in this respect. This is so for the reason that the latter issue is immaterial in view of our decision that the plant guards were not employees." (*Atkins*, R. 321.)

That Court reinstated its former judgment for the reasons stated in its former opinion. (*Atkins*, R. 322.)

ARGUMENT.

With respect to the *Atkins* case, the Board offers two reasons for granting the writ:

> *First*, "The decision of the Circuit Court of Appeals for the Seventh Circuit in the *Atkins* case, holding that militarized guards are not 'employees' within the meaning of the Act (*Atkins*, R. 321, 364), conflicts with the holding of the Circuit Court of Appeals for the Sixth Circuit in the *Jones & Laughlin* case that such persons are 'employees * * * entitled to the protection of the Act' (*Jones*, R. 84-85, 121)." (Petition, p. 21.)
>
> *Second*, "The questions raised by these cases are important for, if the decisions below stand, they overturn a Board policy which for a period of years has effected stable conditions in a large and difficult area of labor relations." (Petition, p. 36.)

It is submitted that neither ground for issuing a writ of certiorari exists in the *Atkins* case.

1. There Is No Conflict Because the Holding in the Atkins Case That Those Auxiliary Military Police Were Not "Employees" of Respondent Resulted From a State of Facts Unlike That in the Jones & Laughlin Case.

It is settled that a conflict between decisions of circuit courts of appeals is not a reason for granting review on writ of certiorari where the asserted conflict arises from differences in states of fact and not in the application of a principle of law. Thus in *Wisconsin Electric Co.* v. *Dunmore Company*, 282 U. S. 813, this Court's order read:

> "*Per Curiam:* It appearing that the asserted conflict in decisions arises from differences in states of

> fact, and not in the application of a principle of law, the writ of certiorari is dismissed as improvidently granted."

To the same effect is *Layne & Bowler Corporation* v. *Western Well Works, Inc.*, 261 U. S. 387.

The rule is stated in *The Business of the Supreme Court at October Term, 1933*, Frankfurter and Hart, 48 Harvard LR 238, 268:

> "The Court is interested in conflicts which impair uniformity of decision where uniformity is significant, conflicts which its decision in the particular case will remove. This rules out, of course, hosts of particularistic applications of general rules turning upon the analysis of special states of fact."

It is also settled that each case must be decided by the Board "upon all the testimony taken" (National Labor Relations Act, Sec. 10(c)) and by the Court only upon the "transcript of the entire record in the proceeding" (National Labor Relations Act, Sec. 10(e)).

> *NLRB* v. *Newport News Shipbuilding and Dry Dock Co.*, 308 U. S. 241.

In its attempt to show that the *Atkins* and *Jones & Laughlin* decisions were essentially similar in their facts, and thus conflicting in their holdings, the Board has ignored the records in both cases. The Board has relied upon an Army Service Forces circular (Appendix B of Petition) which does not appear in the record of either case, which is not shown to have been known to Respondent, the Auxiliary Military Police or the Board at the time of the Board's decision. The Board has further relied upon facts which it asserts exist "in the 'typical' plant guard cases" (Petition, p. 24) and upon the assertion that "the Board has recognized the 'militarized plant guard' as an employee-

category which does not vary materially from case to case" (Petition, p. 21).

The Circuit Court of Appeals' holding that the Board's findings were not supported by the evidence, was required by the fact that those findings were not based upon the evidence presented in the hearing required by the Act, but upon preconceptions of fact acquired by the Board in other unrelated cases to which Respondent was not a party.

The improper joinder of the *Atkins* and *Jones & Laughlin* cases in the same petition has enabled the Board, in its Statement (Petition, pp. 5-18) to shift from one record to the other in a manner implying that the same facts exist in both, and to supply large gaps in both records by citations of the material in Appendix B of the petition which was not in either record.

The facts in the *Atkins* case, as shown by the *Atkins* record, have been stated herein (*supra*, pp. 7-16). A comparison of those facts with the facts in the *Jones & Laughlin* record reveals the following vital differences of fact:

(a) The *Jones & Laughlin* plant guard force existed before the war. All of the indicia of the employment relation were present: the Company hired, fired, paid and controlled the guards. That guard force was militarized: the Auxiliary Military Police status was superimposed upon an existing employment relation.

The *Atkins* record is entirely different. There was no plant guard force and therefore no pre-existing employment relation. The Auxiliary Military Police force was created by the Army by enrolling men who were not previously employees of Respondent. The Auxiliary Military Police status was not superimposed upon any existing employment relation. The guard force existed only as Auxiliary Military Police.

(b) The *Jones & Laughlin* plant guards were hired by Jones & Laughlin. (Jones, R. 4-14.) The *Atkins* plant guards were hired by the Army which enrolled them as Auxiliary Military Police, Respondent merely taking their applications and recommending them (*supra*, pp. 8-9).

(c) *Jones & Laughlin* could discharge its plant guards. (Jones, R. 9.) The *Atkins* plant guards could not be discharged by Respondent, but only by the Army. Respondent's power was limited to suspending a guard temporarily pending approval or disapproval by the Army of a recommendation for dismissal (*supra*, pp. 10-12).

(d) The *Jones & Laughlin* plant guards were paid by the Company (Jones, R. 9) and there was no evidence that the burden of this pay was shifted to the government. The *Atkins* guards were paid by Respondent, but the evidence was that this was done because the government made Respondent pay. There was no evidence that the burden of this pay remained upon the Respondent, and the record supports a finding that it was borne by the government (*supra*, pp. 12).

(e) The *Jones & Laughlin* record is devoid of any evidence about whether the activities of the plant guards are directed and controlled by the Company or by the Army and about where the lieutenants and captains of that guard force get their orders and instructions. The *Atkins* record leaves no room for doubt that all of the instructions, directions and orders to the Auxiliary Military Police came from the Army, or from their Chief, who himself took no orders or directions from Respondent. (*supra*, pp. 13-14)

(f) The *Jones & Laughlin* record is silent on the subject of hours. The *Atkins* record shows that the hours of the Auxiliary Military Police were set by Chief Johnston, who

was not subject to direction, or actually directed, by Respondent.

In view of the complete differences in the records as to the significant facts, there is no conflict between the holding of the Circuit Court of Appeals for the Seventh Circuit that the guards in the *Atkins* case were not "employees" and the holding of the Circuit Court of Appeals for the Sixth Circuit that the guards in the *Jones & Laughlin* case were "employees" within the meaning of the Act.

2. There Is No Conflict Because the Fact That the Guards Were "Employees" Was Not Disputed in the Jones & Laughlin Case.

Respondent has contended, the Board has denied, and the Circuit Court of Appeals has held, that the guards are not its "employees" in any sense, and that therefore were not within the meaning of the Act.

In the *Jones & Laughlin* case the contention of the Company was simply that the guards acted in the interest of the employer and must be treated like supervisory employees under the Act. That Company did not contend that these guards were not its employees. That fact appears throughout the *Jones & Laughlin* record and was asserted again on page 8 of the brief of Jones & Laughlin when that case was previously before this Court (No. 1237, October Term, 1944):

> "* * * in this case, the Sixth Circuit Court of Appeals agreed with the Board that the Otis Works police were 'employees', as the Company had conceded for the purposes of the case."

Even if the facts in the two cases were the same, and it has been shown that they are dissimilar, a conflict justifying certiorari cannot be founded upon a holding of a Circuit Court of Appeals upon an issue not in dispute in the case.

3. The Circuit Court of Appeals Followed the Hearst Case.

The Circuit Court of Appeals quoted the opinion of this Court in *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 130:

> "Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record." (*Atkins*, R. 349.)

It carefully observed this rule in examining the record, and found that the Board's findings were not supported by evidence.

The petition cites two trivial instances of errors which it says the Board made in examining the evidence for support for the Board's findings. Thus the Board says:

> "One glaring example of the error into which the court fell in so doing is its holding that the Atkins Company was a cost-plus-a-fixed-fee contractor whose labor costs were borne by the Government (*Atkins*, R. 355). The record plainly shows that this was not a fact (*Atkins*, R. 31, 332-333, 326-327) and the inferences as to employer-employee relationship drawn from this supposed fact by the court below must, therefore, fall." (Petition, pp. 3-4, footnote 2.)

Actually the Court did not hold that Respondent was a cost-plus-a-fixed-fee contractor. It examined the record, and found no support in the evidence for the Board's finding (*Atkins*, R. 31) that Respondent paid the guards. The Court's statement was as follows:

> "The incident most strongly emphasized is that they were paid by respondent. Undoubtedly, this is the most important incident common to the employer-employee relationship. In the instant case, however, it is, when viewed in connection with the attending circumstances, largely minimized if not entirely ob-

> literated. Payment of these guards by respondent, in fact their employment, was a requirement imposed by the government as a prerequisite to respondent's right to engage in the manufacture of war material. It had no option to pay or not pay; neither did it have any option to employ or not employ. Chief Johnston, when asked why the guards were paid by respondent when their orders were received from the military authorities, stated an incontrovertible fact: 'They pay because the government makes them pay.' It must be assumed, so we think, that respondent was reimbursed by the government for all costs incurred in the manufacture of war material, including that of compensation paid to the guards. In reality, under such circumstances, as bearing upon the employer-employee relationship, we are of the view that it makes no difference whether they were paid by respondent or by the government." (*Atkins*, R. 354-355.)

The record does not, as the Board says in the foregoing footnote, "plainly show that this was not a fact." Its three citations to the record consist of pages 31, 332-333 and 326-327. Page 31 is the Board's own finding. Pages 332-333 and 326-327 are argument of Respondent's attorney before the Board. On page 333 Respondent's attorney states: "We do not operate on a cost-plus basis." On page 332 he stated:

> "when you realize that the company is merely a conduit of that pay, made to pay it as a result of the contracts of the government, contracts which it was impossible to introduce in evidence because of the confidential nature of the product covered thereby, it will be seen that it is merely a technical incident and that in substance it is the government which is the paymaster of these troops."

If this is all the record holds, it cannot be said that the Board's finding is "supported by evidence" as Section 10(e) of the Act requires.

The other instance in which the Board contends that the Circuit Court of Appeals substituted its inference for that of the Board is stated by it as follows:

> "Particularly striking in this respect is the action of the court in substituting for the Board's finding that 'the guards are interviewed for employment by the respondent and not by the United States of America, and are hired by the respondent; * * * their discharge is ordinarily initiated by respondent' (*Atkins*, R. 31; 53-54, 59, 68-72, 81-84, 91-92), and its inference that the authority exercised over these subjects by the military authorities was in the nature of a veto power (*Atkins*, R. 31), the court's own inference that 'the authority to hire and discharge was solely the prerogative of the military' (*Atkins*, R. 357)." (Petition, pp. 23-24, footnote 15.)

A more complete quotation from the Court's opinion will show that it looked for evidence supporting the Board's finding, and discovered that there was none:

> "From what we have shown, we think it is conclusively established that the authority to hire and discharge was solely the prerogative of the military. True, respondent was charged by the government with receiving the application for employment and in making a recommendation. This is the sole support, if it can be characterized as such, found in this record for the Board's finding that respondent was authorized to hire." (*Atkins*, R. 357.)

This was preceded and followed by a careful analysis of the evidence, including many quotations from the record, and then the following statement by the Court:

> "The most favorable possible inference which can be drawn from the record is that respondent's authority, if it had any, with reference to hire and discharge was narrowly limited; in fact, as we have stated, we think it had no right in such matters except that of making recommendations to the military authorities." (*Atkins*, R. 358.)

If these are the only examples of the Court substituting its findings for those of the Board, it is apparent that the standard of the *Hearst* case has been fully met.

The *Hearst* case has also been followed by the Court as to the meaning of the word "employee" as used in the Act. The Court reviewed all of the evidence and found that it did not support a finding that the economic relationship between Respondent and the Auxiliary Military Police was such that the purposes of the Act would be aided by giving the Auxiliary Military Police the protection of the Act. The evidence as to that economic relationship showed that there was no field for collective bargaining open between Respondent and these Auxiliary Military Police. Respondent did not have that "control over the terms and conditions of employment," which the Board applied in its decision as the test of coverage by the Act. (*Atkins*, R. 32.)

4. There Is No Important Issue to Be Decided by This Court.

This case deals with plant guards who are Auxiliary Military Police. There have been no Auxiliary Military Police at Respondent's plant for almost three years. (*Atkins*, Stip. p. 6.) It is assumed that there has been none anywhere at least since Japan surrendered in August 1945. This Court should use as its model its order in *District of Columbia* v. *Sweeney*, 310 U. S. 631, which read:

> "Denied in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance."

The Board in its petition (pp. 36-37) contends that if Auxiliary Military Police are held not to be "employees" the Board "may well be required to undertake new proceedings to establish bargaining rights once again for the

now demilitarized plant guards" in 135 cases previously decided by it. Apart from the fact that those cases did not present the issue of whether those guards were employees in any sense, as this case does, but rather were on the issue of whether guards were supervisory employees, it is obvious that the Seventh Circuit Court's decision will not require new proceedings. It can be assumed that those companies have been bargaining as to guards for several years since their unions were certified; and that their guards have not been militarized for several years. Why then should a decision that militarized guards are not employees cause a withdrawal of recognition from a union representing guards who have not been militarized for several years? That is unrealistic. It is particularly so in view of the distinctive facts of the *Atkins* case already described herein (*supra*, pp. 7, 16).

Neither is there any question in this case which is of importance under the Fair Labor Standards Act, the Social Security Act, or the statute and order creating the National War Labor Board. No ruling or decision under the Social Security Act or the related provisions of the Internal Revenue Code by the Social Security Board or the Commissioner of Internal Revenue has been found which holds Auxiliary Military Police to be employees of the person at whose plant they are stationed. The National War Labor Board has long ceased to exist. The only related Fair Labor Standards Act Case was *Walling* v. *Lum*, 7 Wage Hour Reporter 570, 8 Labor Cases 66,268 (S. D. Miss.) which applied, to a set of facts unrelated to those in this case, a standard dissimilar to that which the Board is asking this Court to declare. If the decision in this case were relevant to that one, the basis of decision in that case would be upset as much by adopting the Board's test of employment as by adopting that of the Seventh Circuit Court.

The fact is that the instant case involves different statutory language and a different statutory purpose than appears in those other enactments. A decision as to the interpretation and purpose of the National Labor Relations Act does not upset rulings based upon the language and declared purposes of those other statutes.

Conclusion.

It is respectfully submitted that the petition of the National Labor Relations Board for a writ of certiorari should be denied.

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FILE COPY

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 419

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

E. C. ATKINS AND COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT, E. C. ATKINS AND COMPANY.

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INDEX.

	PAGE
Questions Presented	2
Statement	6
Argument	20
I. Summary of Argument	20
II. The Auxiliary Military Police Were Not "Employees" of Respondent Within the Meaning of the Act	23
III. Chief of Guards Johnston Acted as Agent of the Army, Not of Respondent	42
IV. The Board Erroneously Assumed That This Case Fell Into a Category Which the Board Had Prejudged	53
V. The Circuit Court of Appeals Properly Found That the Board's Findings of Fact Were Not Supported by Evidence	62
1. The Scope of Judicial Review	62
2. The Circuit Court of Appeals Observed the Limitations Upon the Scope of Its Reviewing Powers	63
(1) The Board's finding that the guards were paid by Respondent	65
(2) and (3) The Board's finding that the guards are hired by the Respondent and that their discharge is ordinarily initiated by the Respondent	67
(4) The Board's finding as to the control exercised by Respondent	71
3. Circular No. 15 Was Not Available to Support the Board's Finding	76
4. The Circuit Court of Appeals Erred in Taking Judicial Notice of Circular No. 15	78
VI. The Order of the Board Is Too Broad in Its Scope	81
VII. Enforcement of the Board's Order Was Properly Denied as Inimical to the Public Welfare	85
Conclusion	87

CITATIONS.

Cases.

Consolidated Edison Company v. National Labor Relations Board, 305 U. S. 197, 229 63

Dravo Corporation, In Matter of, 52 N. L. R. B. 322 ..60, 61

Maryland Drydock Company, In Matter of, 49 N. L. R. B. 733 .....58, 61

Maryland Drydock Company, In Matter of, 50 N. L. R. B. 363 61

May Department Stores Co. v. National Labor Relations Board, 326 U. S. 376 .....63, 78

National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 299 63

National Labor Relations Board v. Express Publishing Company, 321 U. S. 426 83

National Labor Relations Board v. Hearst Publications, 322 U. S. 111 .....20, 24, 25, 40, 41, 42, 58, 63

Southern Steamship Company v. National Labor Relations Board, 316 U. S. 31 85

Standard Oil Co. of California v. Johnson, 316 U. S. 481 80

Miscellaneous.

American Law Institute Restatement, Agency, Vol. 2, Sec. 220(1) 20

Federal Register Act (49 Stat. 501, 44 U. S. C. 305) ... 81

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BRIEF FOR RESPONDENT, E. C. ATKINS AND COMPANY.

The Respondent, E. C. Atkins and Company, respectfully submits that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered on May 31, 1946 (*Atkins*, R. 322), should be affirmed, and presents this Brief in support of that contention.

QUESTIONS PRESENTED.

In place of the single question said to be presented by the *Atkins* case in the Board's Brief, there are actually two questions:

1. Are Auxiliary Military Police of the Army of the United States "employees" of Respondent within the meaning of Section 2(3) of the National Labor Relations Act when:

(a) they never worked for Respondent in any other capacity;

(b) they were required by the Army of the United States to be enrolled to protect the plant internally and externally against *sabotage, espionage* and natural hazards, and to *serve with the Army* in time of disaster, internal disorders, *enemy action by air raid, fifth column activity, paratroop attack or invasion;*

(c) they were required to wear insignia prescribed by the Army because "by wearing such insignia or marks members serving with the Army will be recognized as *legitimate troops*" (Resp. Ex. 4, *Atkins*, R. 110);

(d) they are interviewed by Respondent, but are employed only when they are inducted, after investigation and approval by the Army, and after taking an oath of allegiance to the United States, agreeing to obey the orders of duly authorized officers, hearing the Articles of War read, and subjecting themselves to military law;

(e) they continue to be members of the Auxiliary Military Police until their resignations or dismissals are approved by competent military authority; the extreme authority of Respondent being to recommend dismissal, and to suspend without pay pending action on the recommendation;

(f) they receive all of their orders and instructions from the Army, such orders and instructions being received by the Chief Guard, and communicated by him to the individual guards, or originated by that Chief Guard who acts solely on behalf of, and as a representative of, the Army, and does not represent or act on behalf of Respondent;

(g) the Army has the right to exercise, and did exercise, complete control and direction over the manner and means in which they perform their duties; and over their hours of work, discipline, promotion, and other conditions of employment;

(h) they are paid by checks of Respondent, which pays them because it is required to do so by the government.

2. If, under the facts set forth in question 1, such Auxiliary Military Police are "employees," was it, in December, 1943, inimical to the public welfare to require Respondent to bargain collectively with the representative of the majority of such Auxiliary Military Police with respect to rates of pay, wages, hours, and other conditions of employment?

The Brief of the Board states the sole question to be as follows:

> "The question presented by the *Atkins* case is whether persons who are employed to guard the property of a private employer, who are compensated by that private employer at rates fixed by him, and who are also civilian auxiliaries to the military police of the Army of the United States, are 'employees' within the meaning of Section 2(3) of the National Labor Relations Act."

The statements of fact contained in the question presented by the Board in its Brief are not supported by the evidence. The evidence requires a finding that the facts were as stated in the first of the two questions correctly stated above.

The three chief errors in the Board's version of the question are (a) the statement that these persons "are employed to guard the property of a private employer"; (b) the statement that they "are *also* civilian auxiliaries to the military police of the Army of the United States"; and (c) the omission of most of the important facts.

The fundamental error in those two statements is one which has blinded the Board throughout the proceeding. It is a failure to understand the origin of the Auxiliary Military Police at the Respondent's plants and their mission and purpose. The Board assumes in its Brief that these guards had been employees (not militarized) of Respondent; that as such they were "employees" within the meaning of Section 2(3) of the Act; that militarization was a status superimposed upon an existing employee relationship; and that the question is whether the addition of militarization deprives such guards of their pre-existing status as "employees."

There is no foundation in the evidence for this erroneous assumption. Yet the entire Brief is founded upon it; and it is only this error which explains the Board's effort to join the *Atkins* and *Jones & Laughlin* cases as though they were similar in their facts.

The Board in its Brief has completely ignored the second question in this case, although there were two grounds for the judgment of the Seventh Circuit Court of Appeals. These were stated by that Court in its second opinion as follows:

> (1) "We formerly refused to enforce the Board's order on the ground that, since the alleged employees (plant guards) were militarized, they were not employees of respondent within the meaning of § 2(3) of the National Labor Relations Act."
>
> (2) "Alternatively, we held that even if the guards, despite their militarized status, be considered em-

ployees of respondent, enforcement of the Board's order 'should not be allowed * * * (because) to do so would be or is likely to be inimical to the public welfare.' (*Atkins*, R. 321.)

As to the first ground, the Court said:

> "We have also given this matter further consideration and are of the opinion that our former decision in this respect was correct, and we reaffirm it. (*Atkins*, R. 321.)

As to the second, the Court said:

> "there is no necessity for decision on our part in this respect. This is so for the reason that the latter issue is immaterial in view of our decision that the plant guards were not employees." (*Atkins*, R. 321.)

But the judgment of the Court, on May 31, 1946, was expressed as follows:

> "On consideration whereof, it is ordered and adjudged by this Court that the former judgment of this Court in this matter be reinstated for the *reasons* stated in our former opinion, filed February 27, 1945, and that the Board's motion for enforcement of its order be again denied." (*Atkins*, R. 322. Emphasis supplied.)

STATEMENT.

Following the usual procedure under Section 9(c) of the Act, the Board issued a Decision and Direction of Election finding that the plant guards involved were "employees" within the meaning of the Act, that they constituted an appropriate bargaining unit, and that they were entitled to the collective bargaining rights guaranteed by the Act, despite the fact that they were Auxiliary Military Police. (*Atkins*, R. 5-8.) The petitioning union was selected by a majority in the election and was certified by the Board as the representative of the Auxiliary Military Police. (*Atkins*, R. 17.)

Thereafter, in proceedings under Section 10(c) of the Act, the Board issued a Decision and Order in which it found that the Respondent had refused to bargain collectively with the certified representative of the Auxiliary Military Police thereby engaging in unfair labor practices within the meaning of Section 8(5) and (1) of the Act. (*Atkins*, R. 30-33.) The Board ordered Respondent to cease and desist from refusing to bargain with the Union; to cease and desist from engaging in any like or related acts or conduct interfering with, restraining or coercing the employees; upon request to bargain collectively with the Union; and to post appropriate notices. (*Atkins*, R. 32-33.)

The evidence relating to the Board's finding that these Auxiliary Military Police were "employees" within the meaning of Section 2(3) of the Act and entitled to exercise the bargaining rights guaranteed by the Act may be summarized as follows:

In December 1943, when its refusal to bargain occurred

(*Atkins*, R. 39), Respondent was engaged in the manufacture of saws, tools and armor plate at its so-called "main plant" in Indianapolis, Indiana, and of armor plate at the Fall Creek Ordnance Plant also in Indianapolis, Indiana. (*Atkins*, R. 277.) The main plant was owned by Respondent and its products were sold to jobbers, dealers, subcontractors and the United States Government. (*Atkins*, R. 227.) It was designated as a restricted area under government supervision. (*Atkins*, R. 86.) The Fall Creek Ordnance Plant was owned by the United States Government and operated by Respondent. It was treated by the Army as a military reserve. (*Atkins*, R. 86.) All armor plate was manufactured for the United States Government. (*Atkins*, R. 88, 277; *Atkins*, Stip. p. 3.)

Before Respondent began to produce armor plate it had no plant guard force, although it did have four watchmen at the Main Plant who occupied pensioners' jobs and were employees of Respondent.[1] (*Atkins*, R. 88; *Atkins*, Stip. p. 2.) When Respondent entered upon war production the Army required that an Auxiliary Military Police Force be established with a strength of sixty-four members covering both plants.[2] Except for the four men who

[1] Testimony of C. E. Wood, Respondent's Personnel Director:

"Q. Before the Atkins company became engaged in defense work, will you kindly state how many watchmen were employed as employees by the Atkins company?

A. It varied from four to six. We had two night watchmen on patrol called clock men—made the rounds regularly through the plant and pulled the 82 boxes. The night clocks.

Q. You had four day men?

A. No; two day men at the gates. Frankly, they were, at that time that was a pensioner's job." (*Atkins*, R. 88.)

[2] Testimony of C. E. Wood, Respondent's Personnel Director:

"A. At the beginning of our participation in the production of war materials; namely, armor plate, representatives from the Cincinnati office came into our plant and made a survey and gave us a recommendation of the requirements of the Government inso-

had occupied pensioners' jobs as watchmen, none of the Auxiliary Military Police had ever been employed by Respondent before they became such Auxiliary Military Police.

The War Department described the purpose of the Auxiliary Military Police as follows:

> "The purpose of organizing the plant guard force is to increase the authority, efficiency, and responsibility of the guard forces at plants important to the prosecution of the war, and through military training to provide auxiliary forces throughout the United States *to supplement the Army* in wartime emergency situations." (Resp. Ex. 4, *Atkins*, R. 105-106, Emphasis supplied.)

---

far as plant production would be considered and that was submitted in writing and complied with.

Q. When you say the Cincinnati office, you mean the Cincinnati Ordnance Office?

A. Ordnance Office.

Q. Are most of your contracts with the Ordnance Department?

A. We have had dealings in the past and have complied with the recommendations of both the army and navy. The major part of our control was of the army and at this time is practically all controlled by army interests.

Q. Was it the Ordnance Department that insisted upon your switching over from a watchman basis to an Auxiliary Military Police basis or was it the Military Police?

A. It was the army representatives from the Ordnance Department of Cincinnati, out of Col. Rasmussen's office that required it.

Q. As a result of that insistence the Auxiliary Military Police were employed?

A. That is correct.

Q. State whether or not, Mr. Witness, the Atkins company could retain any of its war contracts if it did not submit to the system of Auxiliary Military Police that is now in force at the plants?

A. It is understood and the majority of the contracts submitted, you will find the clause stating that unless proper protection of Government property is provided in compliance with certain directives, that will be issued from time to time, some of these special contracts will be or might be cancelled and fact of the matter is would be if we did not comply with the interests." (*Atkins*, R. 88-89.)

It described their mission in these terms:

"6. The mission of a guard force of Auxiliary Military Police is:

(a) To provide interior and exterior protection of the plant against *sabotage* and *espionage* and natural hazards.

(b) To *serve with the Army* in providing the protection to the plant and its environs in emergency situations.

7. An emergency situation in which the Auxiliary Military Police may be called upon for military service may arise from flood, conflagration, or other disaster; internal disorders hazardous to property or production important to the prosecution of the war; *protection from air raid; Fifth Column activity; paratroop attack or invasion;* or it may arise from any other condition or circumstances involving the plant or its community." (Resp. Ex. 4, *Atkins*, R. 106, Emphasis supplied.)

Applicants were enrolled in the Auxiliary Military Police as follows: They filled out application forms in Respondent's personnel office, which receives these forms on behalf of the Army.[3] (*Atkins*, R. 54, 68, 91.) These

[3] Testimony of C. E. Wood, Respondent's Personnel Director:

"Q. When a person applies for employment as an Auxiliary Military Policeman, where does he fill out the application from which Employer's Exhibit No. 5 is taken? Is that done in your office?

A. Yes, sir.

Q. Your office both in the main plant and the Fall Creek plant?

A. Yes.

Q. Do you have the authority to accept that application for the military authorities?

A. I can accept that only subject to the approval or disapproval of the Cincinnati office. We select or rather we interview and select prospective guards. Those men are in turn, their names are submitted to the Cincinnati office along with the proper papers that are provided by the Government for them to fill out. By their approval they are permanently inducted into the Military Police

were submitted with the recommendation of Respondent to the Army. (*Atkins*, R. 92.) The Army made an independent investigation of the applicants and enrolled them only if it approved them. (*Atkins;* R. 68, 71, 92.) This was in accordance with the applicable War Department regulation:

> "A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto." (Resp. Ex. 4, *Atkins*, R. 109.)

At the time a guard was enrolled, he was required by the Army to make, in writing and orally, an oath of allegiance to the Constitution, and to make a written agreement with the United States to obey any orders issued in connection therewith by the President, as Commander-in-Chief of the Army and Navy of the United States, and by his duly authorized officers, and an acknowledgment that the appropriate Articles of War had been read and explained to him and that he was subject to military law. (Resp. Ex. 2, *Atkins*, R. 103-104, 54, 56 and 57.) This was

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group, or upon their rejection, they would be given their dismissal papers.

Q. When you say you select them, as a matter of fact, all you do is just to recommend the man to them?

A. I interview, but recommend them.

Q. When they have been recommended, do you know whether or not the military authorities make an independent investigation as to the capacity, integrity, and patriotism of the man whom you have recommended?

A. In the past two years, it has come to my attention, for no statement has been made, that they do, but the report has come back which made it necessary to remove a man on the force.

Q. Is that so that you are satisfied that an independent investigation is made?

A. That's correct.

Q. In addition to what you have learned in the court room today from Chief Johnston?

A. Yes." (*Atkins*, R. 91-92.)

required by the Army regulations. (Resp. Ex. 4, *Atkins*, R. 105.)

Each guard was issued an Auxiliary Military Police identification card by the Army (Resp. Ex. 3, *Atkins*, R, 104, 55, 69) which was not carried by Respondent's employees. (*Atkins*, R. 91.)

Auxiliary Military Police were ruled by the Army to be particularly subject to the following Articles of War: Articles 58 (desertion), 61 (absence without leave), 62 (disrespect toward the President, Vice President, Congress, Secretary of War, Governors and Legislatures), 63 (disrespect toward superior officers), 63 (assaulting or wilfully disobeying superior officer), 66 (mutiny or sedition), 68 (quarrels, frays and disorders), 69-74 (arrest and confinement), 76 (subordinates compelling commander to surrender), 81 (relieving, corresponding with or aiding the enemy), 82 (spies), 83 (military property), 85 (drunk on duty), 88 (intimidation of persons bringing provisions), 89 (good order to be maintained and wrongs redressed), 90 (provoking speeches or gestures), 92 (murder and rape), 93 (various crimes), 94 (frauds against the government), 96 (general article), 104 (disciplinary powers of commanding officers), and 105 (redress of injuries to property). These are specified in the Army regulations (Resp. Ex. 4, *Atkins*, R. 106) and appear verbatim in the Record. (Resp. Ex. 9, *Atkins*, R. 117-155.)

Only the Army could terminate the tenure of a member of the Auxiliary Military Police. The authority of Respondent was limited to suspension pending action on a recommendation of dismissal.

> "25. A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant

guard force would be impaired and declines to give his approval thereto. Inasmuch as the guards are under oath to the Army, the plant management may suspend a guard without pay pending approval of his dismissal by the District Plant Guard Officer and pending the termination of the guard's enrollment as a member of the Auxiliary Military Police." (Resp. Ex. 4, *Atkins*, R. 109.)

This was so in practice as well as in the regulations as is shown in the following testimony of Chief of Guards Johnston:

"Q. Whenever a man is discharged from the Military Police, who discharges him, the personnel office at E. C. Atkins and Company or the Military?

A. The military discharges him from the Auxiliary Military Police. Now there is one thing that should be said there. He can be relieved of his duty temporarily by myself or by E. C. Atkins and Company, problematically for breaking some rule or otherwise proving that he is not doing his duty; he could be relieved temporarily but he could not be discharged by E. C. Atkins and Company." (*Atkins*, R. 72.)

Q. Do you have the right to recommend him for promotion or discharge? Do you do that?

A. I recommend a man for discharge but I don't discharge him myself.

Q. Do you have the right to recommend them for discharge?

A. Yes, sir.

Trial Examiner Shroyer: While on the subject, to whom do you recommend?

The Witness: To Capt. Wetenhall, Cincinnati, who does the discharging.

Trial Examiner Shroyer: Who issues these two different types of terminations?

The Witness: He does; he issues those." (*Atkins*, R. 81.) (See also *Atkins*, R. 84, 89.)

The Army regulations provided some authority to plant management as to hiring and firing, where there

was *a pre-existing plant guard force, which was not the case at Respondent's plant*:

> "24. Basically the militarization of the plant guard forces does not change the *existing* systems of hiring, compensation, and dismissal *except as stated in paragraph 25.* All remain, primarily, a matter between the guards and plant management. Guards in the employ of a private employer may, *as heretofore*, be dismissed and those who were Civil Service employees in the employ of the War Department may be dismissed by the local commanding officer, in accordance with Civil Service Regulations. In neither case is a Court Martial necessary." (Resp. Ex. 4, *Atkins*, R. 109, Emphasis supplied.)[4]

Of course, paragraph 24 does not apply to Respondent, for Respondent had no plant guard force before the Army installed Auxiliary Military Police, so there was no "existing system" and there was no precedent for dismissing "as heretofore".

Respondent paid the wages of the Auxiliary Military Police (*Atkins*, R. 82, 85) because "the Government makes them pay" (*Atkins*, R. 82) and made the necessary payroll deductions. (*Atkins*, R. 85.) There is no other evidence about where the ultimate burden of that payment

[4] Note that this is expressly limited by paragraph 25, which reads:

"25. 'A member of the Auxiliary Military Police *may not be employed, dismissed, or may not resign* if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto. Inasmuch as the guards are under oath to the Army, the plant management may suspend a guard without pay pending approval of his dismissal by the District Plant Guard Officer and pending the termination of the guards enrollment as a member of the Auxiliary Military Police. This will usually be done on the management's recommendation unless an emergency requires the guards retention." (Resp. Ex. 4, *Atkins*, R. 109, Emphasis supplied.)

fell. Respondent's counsel stated in argument before the Board "we do not operate on a cost-plus basis?" (*Atkins*, R. 333.) But in that same argument he stated:

> "when you realize that the company is merely a conduit of that pay, made to pay it as a result of the contracts of the government, contracts which it was impossible to introduce in evidence because of the confidential nature of the product covered thereby; it will be seen that it is merely a technical incident and that in substance it is the government which is the paymaster of these troops." (*Atkins*, R. 332.)

The Army regulations contained the following provision, which obviously referred to plant guard forces which had not originated as Auxiliary Military Police, and which therefore did not apply to this case:

> "27. The status of the employer in regard to the employee benefits for the guard force *is not changed.* For example, Social Security, Workmen's Compensation, Employer's Liability and vacation schedules *remain* unaffected. Employers should have a clear understanding with their insurance companies concerned." (Resp. Ex. 4, *Atkins*, R. 110, emphasis supplied.)

These same Army regulations said:

> "36. *The Auxiliary Military Police are agents of the Federal Government* and will not be subject to any state or municipal requirement which conflicts with their war time duties." (Resp. Ex. 4, *Atkins*, R. 111, emphasis supplied.)

The Auxiliary Military Police were armed (*Atkins*, R. 78) as they were required by the regulations to be. (Resp. Ex. 4, *Atkins*, R. 110.) They were required to wear distinctive insignia because:

> "By wearing such insignia or marks, members, serving with the Army, *will be recognized as legitimate troops* and not deemed irregulars or guerillas." (Resp. Ex. 4, *Atkins*, R. 110, emphasis supplied.)

They were authorized to wear service stripes which "will be in accordance with Army Regulations" (Resp. Ex. 4, *Atkins*, R. 110) and "such decorations, service medals, ribbons, and badges as are authorized for wear on the United States Army service uniform." (Resp. Ex. 4, *Atkins*, R. 110.)

It is uncontradicted in the evidence that the Army had the right to exercise, and did exercise, complete control and direction over the manner and means in which the Auxiliary Military Police performed their duties. This was done through Captain Wetenhall, the Fifth Service Command, District Plant Guard Officer, Lieutenant Scanlon, his assistant, and Chief Johnston, of the Auxiliary Military Police.

Chief Johnston had never been an employee of Respondent. (*Atkins*, R. 68.) He was enrolled directly in the Auxiliary Military Police (*Atkins*, R. 68) as Chief (*Atkins*, R. 71).

The Auxiliary Military Police Chief received his orders from the Army (*Atkins*, R. 73, 83), was inspected by them, and could be removed from his authority by the army. (*Atkins*, R. 82.) He received no orders or instructions from Respondent and was not responsible or answerable to Respondent. (*Atkins*, R. 75, 78, 80, 82.)

> "Q. Do any of the Military Police under your command take any orders from any officer, director, or agent of the Atkins company as such?
>
> A. No; they wouldn't take any orders. Just like myself, they would cooperate in any way they could, but they would only—
>
> Q. Suppose such cooperation involved deviation from such specific order which you had to give. Would they follow your specific order or would they cooperate?
>
> A. They would—that would be their orders—to follow mine; yes, sir." (*Atkins*, R. 78.)

Chief Johnston worked "very closely" with Respondent's personnel director and testified that "I try to cooperate to the best of my ability and he does the same for me" (*Atkins*, R. 78) but he had never taken an order from the personnel director. (*Atkins*, R. 75.)

Chief Johnston, on his own authority, rotated the shifts of the Auxiliary Military Police, contrary to Respondent's system. (*Atkins*, R. 78-79.) He promoted members of Auxiliary Military Police to the rank of lieutenant without prior consultation, upon his own final authority, later notifying Respondent of their new rank. (*Atkins*, R. 82.)

Auxiliary Military Police were required to salute all Army officers. (Resp. Ex. 11, *Atkins*, R. 157.) This was enforced, and a guard was reprimanded by Captain Wetenhall for failure to salute him. (*Atkins*, R. 75.)

The *evidence* contains nothing directly on the subject of collective bargaining rights. The Board's Brief refers to a War Department circular which is printed in Appendix B of that Brief and which contains the statement "Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police." This circular is not part of the record in this case, and there is nothing to indicate that either Respondent or the Auxiliary Military Police themselves had ever heard of it. The Board's failure to introduce it in evidence or refer to it in its decisions indicates that the Board had never heard of it either.

This same circular says:

> "The Auxiliary Military Police, *as agents of the Federal Government*, will not be subject to any state or municipal requirement which conflicts with their wartime duties." (Board's Brief App. B., emphasis supplied.)

The union seeking to represent the Auxiliary Military Police was not the same union which represented the production and maintenance employees. (*Atkins*, R. 85-88.)

The Board found that the Auxiliary Military Police were "employees" of Respondent, that they were entitled to the collective bargaining rights under the Act, and that Respondent had committed an unfair labor practice, and ordered Respondent to bargain collectively with the union representing them. (*Atkins*, R. 31-32.)

The Circuit Court of Appeals for the Seventh Circuit denied the Board's petition for enforcement upon two grounds (*Atkins*, R. 348-366) which it later summarized as follows:

> 1. "We formerly refused to enforce the Board's order on the ground that, since the alleged employees (plant guards) were militarized, they were not employees of respondent within the meaning of § 2(3) of the National Labor Relations Act."
>
> 2. "Alternatively, we held that even if the guards, despite their militarized status, be considered employees of respondent, enforcement of the Board's order 'should not be allowed * * * (because) to do so would be or is likely to be inimical to the public welfare.'" (*Atkins*, R. 321.)

The Board petitioned for a writ of certiorari. (No. 1238, October Term, 1944.) In that petition the Board stated (as was not in the record) that the guards had been demilitarized and were no longer Auxiliary Military Police, but urged that this did not render the case moot. On June 4, 1945, this Court entered the following order:

> "*Per Curiam:* The petition for writs of certiorari is granted. The judgments are vacated and the cases are remanded to the respective United States Circuit Courts of Appeals for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof on the Board's orders." (325 U. S. 838.)

The Board and Respondent then entered into stipulations as to the alleged changed circumstances with respect to demilitarization. The Board filed with the Circuit Court of Appeals for the Seventh Circuit a motion for a decree enforcing its order. This was denied by that Court in the following terms:

> "We have considered the facts relative to the changed status of the plant guards by reason of their demilitarization and are of the opinion that they are irrelevant to the issues which we have heretofore decided adversely to the Board. Certainly such is the case with reference to our decision that the plant guards were not employees of respondent within the meaning of the Act. In fact, the irrelevancy of the changed circumstances as to this issue is conceded by the Board. We are urged by the Board, however, to reverse our former decision and to hold that the plant guards were employees. We have also given this matter further consideration and are of the opinion that our former decision in this respect was correct, and we reaffirm it.
>
> Although we are doubtful that the facts concerning the demilitarization of the plant guards and their changed status as a result thereof are material to our alternative holding that the enforcement of the Board's order 'would be or is likely to be inimical to the public welfare,' there is no necessity for decision on our part in this respect. This is so for the reason that the latter issue is immaterial in view of our decision that the plant guards were not employees." (*Atkins*, R. 321.)

That Court, however, reinstated its former judgment for all the reasons stated in its former opinion:

"JUDGMENT.

May 31, 1946.

This cause came on to be heard on the transcript of the record from the National Labor Relations Board and on Motion for enforcement of decree pursuant to mandate of the Supreme Court of the United States which remanded this cause to this Court for further consideration of alleged changed circumstances with respect to the demilitarization of the employees involved and the effect thereof on the Board's orders.

On consideration whereof, it is ordered and adjudged by this Court that the former judgment of this Court in this matter be reinstated for the *reasons* stated in our former opinion, filed February 27, 1945, and that the Board's motion for enforcement of its order be again denied." (*Atkins*, R. 322. Emphasis supplied.)

ARGUMENT.

I.

Summary of Argument.

The Auxiliary Military Police were not "employees" of Respondent within the meaning of that term in the Act and, therefore, the refusal of Respondent to bargain with the Union as the representative of those Auxiliary Military Police is not an unfair labor practice under the Act. These Auxiliary Military Police were not "employees" by any meaning which might be ascribed to that term. Obviously they were not employees by common law standards since Respondent had no control over "physical conduct in the performance of the service." *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111 at 128; American Law Institute Restatement, Agency, Vol. 2, Sec. 220 (1). It is equally clear that these Auxiliary Military Police were not employees within the meaning ascribed to that term by this Court in *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, since the relationship between Respondent and these Auxiliary Military Police, both as a matter of law and of economic fact, was not one in which there existed the mischief which the Act was designed to correct or with respect to which the ends of the Act could be attained. There was here no danger of "strikes and other forms of industrial strife or unrest" which would be "substantial obstructions to the free flow of commerce" because of the relationship of these Auxiliary Military Police to the United States Army. Because of that same relationship to the Army it was not possible to promote collective bargaining between these Auxiliary

Military Police and Respondent, nor could any inequality of the individual guard's bargaining power be remedied by protecting the freedom of organization and designation of representatives for bargaining by these Auxiliary Military Police. Respondent could not bargain with such representatives and, while it is irrelevant to this case, it may fairly be assumed that the Army would not so bargain.

An examination of the terms of the proposed Collective Bargaining Agreement submitted by the Union to Respondent (Board's Ex. 102, *Atkins*, R. 297-304), a typical instrument covering the usual subjects of collective bargaining, shows that Respondent could not effectively agree as to any of them. All were controlled by the Army, and Respondent's agreement would be empty and without effect.

The Chief of Guards, Henry A. Johnston, was a representative of the Army, and dealt with and directed the Auxiliary Military Police on behalf of the Army. He did not represent Respondent and his acts were not the acts of Respondent.

The Board has erroneously assumed that all Auxiliary Military Police fall into a "generic employee-category" which it early recognized, in which the incidents of employment and their relation to the military do not vary materially. The Board has not previously dealt with Auxiliary Military Police forces created by the Army, and so persists in assuming that this one consisted of prewar employees upon whose employee status militarization was superimposed. The Board has not previously dealt with a force of Auxiliary Military Police whose terms and conditions of employment were set and controlled by the Army. The Board's previous cases, rather, have involved only the contention that guards are representatives of management and hence within the definition of "employer" in Section 2(2) of the Act. The Board therefore has failed to appreciate the distinctive nature of this case. The Circuit Court

of Appeals' decision does not conflict with any established policy of the Board.

The Circuit Court of Appeals properly applied the rules of judicial review established by the Act and the decisions of this Court. It correctly determined that the Board's findings of fact were not supported by evidence. It held the evidence insufficient even though it considered among it a Circular No. 15 issued by Headquarters, Army Service Forces which is not part of the record, but was printed in an Addendum to the Board's Brief. It should not have considered that Circular No. 15 because it was not in evidence, was not subject to judicial notice, and was not considered by the Board in making its findings.

Even if, contrary to Respondent's contention and the Circuit Court of Appeals holding, it is held that the Auxiliary Military Police are Respondent's employees, the scope of the Board's Order is too broad because of (1) the fact, admitted by the Board, that much control rested in the Army and not Respondent and, therefore, Respondent could not bargain as to many terms and conditions of employment; (2) the excellent and harmonious collective bargaining relations of Respondent with the two unions representing its production employees; and (3) the fact that the Respondent's refusal to bargain was based solely upon its belief (shared by the Circuit Court of Appeals) that the Auxiliary Military Police were not its employees, and was not marked by any coercion or opposition to union membership or collective bargaining.

Even if the Board's Order were otherwise proper, it would conflict with the overriding National purpose of prosecuting the War. The Army kept to itself the control and determination of the terms and conditions of employment because these Auxiliary Military Police were enrolled for service with the Army during wartime. The Order of the Board, if it was not empty and futile, would

deprive the Army of this control. The jurisdiction of the Board does not extend so far.

II.

The Auxiliary Military Police Were Not "Employees" of Respondent Within the Meaning of the Act.

The National Labor Relations Act grants its benefits only to those persons who are "employees" within the meaning of that term as used therein; and it imposes obligations only upon those persons who are "employers" within the meaning of that term in the Act. Furthermore those obligations imposed upon employers exist only with respect to those persons standing in the relationship of "employee" to those employers. No employer is required to bargain collectively with persons who are the "employees" of some other "employer," and obviously not with persons who are not "employees" of any one.

Therefore the most important question in the instant case is whether the Auxiliary Military Police were "employees" of Respondent. Respondent at all times contended that they were not. The Board found in its Decision and Order that these Auxiliary Military Police were employees of Respondent. (*Atkins*, R. 32.) The United States Circuit Court of Appeals for the Seventh Circuit held directly as the majority ground of its Decision that they were not employees of Respondent within the meaning of the Act (*Atkins*, R. 364); and it reiterated this holding when the question was before it the second time (*Atkins* R. 321). The Circuit Court of Appeals held that the Board's finding that these persons were employees did not have warrant in the Record or a reasonable basis in law.

The leading decision of this Court upon the meaning of

the term "employee" in the Act is *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111. In that decision this Court pointed out that Congress did not explicitly define the term. The contention of the respondent in that case that the meaning must be determined by common law standards was rejected, whether this referred to the local state law or to some pervading general essence distilled from the state law. This Court said on the contrary that the meaning of the term was to be determined from the history, terms and purposes of the Act, and specifically by an examination of the context of the statute read in the light of the mischief to be corrected and the end to be attained.

This Court found the mischief to be corrected and the ends to be attained by the Act to be those set forth in its first section. The mischief was found to be "strikes and other forms of industrial strife or unrest" which were "substantial obstructions to the free flow of commerce." These were found to result in large measure from the refusal of employers to bargain collectively, and the inability of individual workers to bargain successively for improvements in their wages, hours, and other working conditions with employers who, themselves, were organized in the corporate or other forms of ownership association.

It was found that the purposes of the Act were (1) to encourage collective bargaining, and (2) to remedy the individual worker's inequality of bargaining power by protecting him in full freedom of association and self-organization and the designation of representatives for the purpose of negotiating the terms and conditions of employment.

It must be obvious from the facts stated herein that by common law standards these Auxiliary Military Police are not employees of Respondent. They do not satisfy any test of the employment relationship, and specifically

they do not satisfy the test of "control of physical conduct in the performance of the service" which this Court has said is the traditional test of the employee-relationship at common law. *NLRB* v. *Hearst Publications*, 322 U. S. 111, at 128, N. 27. It is not, however, useful to demonstrate this in detail in this Brief since this Court has rejected that test as the determinate to employment relationship under the Act.

It is important to apply the test of the *Hearst* case to the facts in the instant case since such application demonstrates that these Auxiliary Military Police were not employees of Respondent under the statute. The *Hearst* decision holds that the employment relationship exists if in the relationship there is a danger of strikes and other forms of industrial strife or unrest which may obstruct the free flow of commerce; and if by the encouragement of collective bargaining and the protection of the workers in self-organization and designation of representatives for bargaining, such obstructions to commerce can be eliminated.

These purposes cannot be attained unless the law and the economic facts permit effective collective bargaining between Respondent and the Auxiliary Military Police. Effective collective bargaining requires negotiation in a good faith attempt to agree upon the wages, hours, rates of pay, and other conditions of employment which are to prevail. If Respondent cannot, as a matter of law or of economic fact, make an agreement with the Union that will actually set those terms of employment, then there cannot be effective collective bargaining. Under those circumstances the mischief to be corrected by the Act would not exist; and the ends to be attained by the Act could not be attained by holding these Auxiliary Military Police to be employees of Respondent under the Act. To order such collective bargaining would be an act of futility.

The legal and economic facts of the relationship between Respondent and the Auxiliary Military Police are to be found both in the communications from the Army to Respondent and to the individual police, and in the actual practice by which the relationship among those three parties was conducted. An examination of those communications and those practices demonstrates that there was no field for collective bargaining between Respondent and the Auxiliary Military Police and that, therefore, their relationship was not one of employment to which the statute was directed. The absence of scope for collective bargaining can be demonstrated by an examination of the proposed Collective Bargaining Agreement tendered by the Union to Respondent in December 1943 as part of its demand for bargaining (*Atkins*, R. 281-282). This was received in evidence as Board's Exhibit 102, and is set forth verbatim in the Record at pages 297 to 305. This Agreement, as to the subjects covered and the general type of provision, is a typical collective bargaining agreement. If Respondent could not, as a matter of law or economic fact, enter into such an Agreement, then there is no scope for collective bargaining between Respondent and the Auxiliary Military Police.

Article I, Sections 1 and 2, of the proposed Contract contain solely a recognition by the Company of the Union and a statement of the scope of the appropriate bargaining unit. These are not subjects for bargaining.

Article I, Section 3, of Board's Exhibit 102 (*Atkins*, R. 297) contains a provision for a union shop. It requires that the Auxiliary Military Police join the Union and "as a condition of employment shall remain members in good standing in the Union." It is clear from the evidence that Respondent could not effectively make this agreement. It purports to bind Respondent to discharge any member of the Auxiliary Military Police who fails to main-

tain membership in good standing in the Union. Respondent, however, had no right to discharge any Auxiliary Military Policeman and, as a matter of practice, did not purport to exercise that right.

Only the Army could terminate the tenure of a member of the Auxiliary Military Police. The authority of Respondent was limited to suspension pending action or a recommendation of dismissal. This appears explicitly in the Orders which were received by Respondent and by the Auxiliary Military Police from the Army:

> "25. A member of the Auxiliary Military Police *may not be employed, dismissed, or may not resign* if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto. Inasmuch as the guards are under oath to the Army, the plant management may suspend a guard without pay pending approval of his dismissal by the District Plant Guard Officer and pending the termination of the guard's enrollment as a member of the Auxiliary Military Police." (Resp. Ex. 4, *Atkins*, R. 109. Emphasis supplied:)

This was so in practice as well as in the Regulations as appears from the testimony of the Chief of Guards, Henry A. Johnston:

> "Q. Whenever a man is discharged from the Military Police, who discharges him, the personnel office at E. C. Atkins and Company or the Military?
>
> A. The Military discharges him from the Auxiliary Military Police. Now there is one thing that should be said there. He can be relieved of his duty temporarily by myself or by E. C. Atkins and Company, problematically for breaking some rule or otherwise proving that he is not doing his duty; he could be relieved temporarily but he could not be discharged by E. C. Atkins and Company. (*Atkins*, R. 672.)
>
> Q. Do you have the right to recommend them for promotion or discharge? Do you do that?

A. I recommend a man for discharge but I don't discharge him myself.

Q. You have the right to recommend him for discharge?

A. Yes, sir.

Trial Examiner Shroyer: While on the subject, to whom do you recommend?

The Witness: To Capt. Wetenhall, Cincinnati, who does the discharging.

Trial Examiner Shroyer: Who issues these two different types of terminations?

The Witness: He does; he issues those." (*Atkins*, R. 81.) (See also *Atkins*, R. 84, 89.)[5]

The Army Regulations do provide some limited authority to plant managements as to discharging plant guards in situations where there was a civilian plant guard force upon which the status of militarization had been superimposed. That provision is as follows:

"24. Basically the militarization of the plant guard forces does not change the *existing* systems of hiring, compensation, and dismissal *except as stated in paragraph 25*. All remain, primarily, a matter between the guards and plant management. Guards in the employ of a private employer may, *as heretofore*, be dismissed and those who were Civil Service employees in the employ of the War Department may be dismissed by the local commanding officer, in accordance with Civil Service Regulations. In neither case is a Court Martial necessary." (Resp. Ex. 4, *Atkins*, R. 109. Emphasis supplied.)

Note that this provision is very much limited by paragraph 25, quoted *supra*.

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[5] As appears in Part III of this Brief, Chief Johnston was himself a member of the Auxiliary Military Police, who was enrolled by the Army, made Chief by the Army, was responsible to the Army, and acted at all times on behalf of the Army and not on behalf of Respondent. This is important to remember since the Board has cited actions by Chief Johnston, such as promotions and changes in shifts, as if they were the acts of Respondent, and as if they showed that Respondent was in practice controlling the conditions of work of the Auxiliary Military Police.

It is to be observed that Paragraph 24, just quoted, has no application to the existing case. It relates to the continuation during militarization of systems of dismissing guards in plants where such plant guards and such systems existed before militarization. As is emphasized elsewhere in this Brief, there was no plant guard force at the Respondent's plant upon which militarization was superimposed. The Auxiliary Military Police force at Respondent's plant came into existence by enrollment by the Army and was not a force composed of former employees of Respondent. The provisions of Paragraph 24, quoted above, do not grant any dismissal rights to Respondent because there was no existing system on dismissal of plant guards to be preserved by that Paragraph 24.

It, therefore, appears that the union shop agreement in Article I, of Board's Exhibit 103 (*Atkins*, R. 297), a common subject of collective bargaining, is one with respect to which Respondent cannot bargain either as a matter of law or as a matter of economic fact, because Respondent could not perform any obligation to dismiss Auxiliary Military Police who do not remain in good standing in the Union.

Articles II and III, of Board's Exhibit 103 (*Atkins*, R. 297-299), together deal with the personnel and mechanics of grievance procedure. Although the personnel designations and the particular steps in the procedure vary in the collective bargaining agreements of various employers and unions, these provisions in Articles II and III are typical grievance procedure provisions. They refer to grievances which may arise when an "employee" believes that Respondent is violating any part of the Collective Bargaining Agreement, or that the "employee" is being "unjustly or unfairly dealt with by any officer or agent of the Company." They provide that those grievances shall be taken up by the employees and certain officers

of the Union, on the one hand, and by the Auxiliary Military Police Sergeant, the Auxiliary Military Police Captain, and certain executive officers of the Respondent, on the other hand. They provide that any decision reached at any step in the procedure, in the absence of an appeal to the next step, shall be binding.

It is apparent that if Respondent entered into these two Articles of the proposed Collective Bargaining Agreement, it would be undertaking obligations which it could not enforce. It will be demonstrated elsewhere in this Brief that Respondent does not, and cannot, control the actions of the Sergeant, Captain, Chief, or other officer, however designated, of the Auxiliary Military Police. These officers are designated by, and act at the direction and on behalf of, the Army. The Respondent cannot agree that these officers would meet with representatives of the Union or enter into any negotiations with those representatives. Likewise the Respondent could not have done any of the acts which would constitute a grievance nor did the Respondent have the powers to put into effect any changes which might be awarded as the result of the proposed grievance procedure. Grievances commonly arise with respect to promotions, transfers, discipline, lay-off, or dismissal, shift assignments, and other similar conditions of employment. The average collective bargaining agreement either determines such conditions of employment or prescribes the manner and standards by which they shall be determined. A failure of the employer to observe the conditions in accordance with the methods and standards contained in the Agreement, results in a filing of a grievance, a direction that the conditions improperly established by the employer be changed, and the installation of those changes by the employer.

It is clear and undisputed in the evidence that these con-

ditions of employment are not within the control of Respondent, but rather are controlled and established by the Army through regular Army officers, or through the Chief of the Auxiliary Military Police who, as has been said, was controlled by, and acting for, the Army and not Respondent.

Chief Johnston, on his own authority, rotated the shifts of the Auxiliary Military Police, contrary to Respondent's system. (*Atkins*, R. 78-79.) He promoted members of Auxiliary Military Police to the rank of lieutenant without prior consultation, upon his own final authority, later notifying Respondent of their new rank. (*Atkins*, R. 82.) Auxiliary Military Police were required to salute all Army officers. (Resp. Ex. 11, *Atkins*, R. 157.) This was enforced, and a guard was reprimanded by Captain Wetenhall for failure to salute him. (*Atkins*, R. 75.) It has already been demonstrated that dismissal was controlled by, and was a function of, the Army, and not of the Respondent.

Discipline was a subject which the Army reserved to itself, requiring the Auxiliary Military Police to agree in writing to sign an agreement to obey orders issued by the officers of the Army and Navy, and to be subject to military. (Resp. Ex. 2, *Atkins*, R. 103.) Auxiliary Military Police were subject to the Articles of War, especially Articles 58 (desertion), 61 (absence without leave), 62 (disrespect toward the President, Vice President, Congress, Secretary of War, Governors and Legislatures), 63 (disrespect toward superior officer), 64 (assaulting or willfully disobeying superior officer), 66 (mutiny or sedition), 68 (quarrels, frays and disorders), 69-74 (arrest and confinement), 76 (subordinates compelling commander to surrender), 81 (relieving, corresponding with or aiding the enemy), 82 (spies), 83 (military property), 85 (drunk on duty), 88 (intimidation of persons bringing provisions),

89 (good order to be maintained and wrongs redressed), 90 (provoking speeches or gestures), 92 (murder and rape), 93 (various crimes), 94 (frauds against the government), 96 (general article), 104 (disciplinary powers of commanding officers), and 105 (redress of injuries to property). These are specified in the Army regulations (Resp. Ex. 4, *Atkins*, R. 108) and appear verbatim in the Record. (Resp. Ex. 9, *Atkins*, R. 117-155.)

The Respondent had no control over discipline, as appears from the following testimony of Cyrus E. Wood, Respondent's Personnel Director:

> "Q. What would you do, Mr. Witness, if one of the Auxiliary Military Police came to you and protested to any action of a disciplinary nature by Chief Johnston?
>
> A. Report that to the proper authorities, in this case to Col. Rasmussen in Cincinnati. He is the man that my office deals with when necessary.
>
> Q. You would take no jurisdiction yourself?
>
> A. No; not without instructions from Col. Rasmussen.
>
> Q. You do, whenever matters of discipline are taken up in your plant get confirmation of any instructions which Col. Rasmussen or Capt. Wetenhall sent to Chief Johnston or to Chief Hann, is that right?
>
> A. That's right." (*Atkins*, R. 90.)

It thus appears that as a matter of law and economic fact the Respondent could not bargain with respect to grievance procedure. The subject matter from which grievances arise in normal employment relationships was not within the discretion or control of the Respondent. Respondent would have been powerless to adjust any grievance which the Union might raise. The employee who had been court-martialled and dismissed by the Army, even though utterly unjust, could not obtain redress by

any grievance procedure between Respondent and the Union.

Article IV, of Board's Exhibit 102 (*Atkins*, R. 299), provides that Respondent "shall have the right to discharge, suspend or discipline any employees for cause or violation of any of the Company's posted rules or regulations." The reservation by the Army of complete control over dismissal and discipline has already been sufficiently demonstrated herein. This provision in the Collective Bargaining Agreement is futile. Article IV then provides that any employee unjustly discharged, suspended or disciplined shall have recourse to the grievance procedure and if, after investigation, it is found that he was unjustly dismissed, he shall be reinstated without loss of seniority and shall be paid for wages lost. This also is based upon the erroneous assumption that the Respondent could restore to the Auxiliary Military Police one who was dismissed or otherwise disciplined; for such dismissal or discipline would have to come from the Army; on the plain record it cannot come from Respondent.

Article V, of Board's Exhibit 102 (*Atkins*, R. 299-300), deals, according to its title, with "general working conditions." It provides that there shall be no strikes, although the Articles of War have already precluded strikes as a subject of bargaining by Auxiliary Military Police. Among the Articles of War which are specified by the War Department as being especially applicable to Auxiliary Military Police, and as defining "certain offenses punishable by court martial of which persons subject to military law may be guilty" (Resp. Ex. 4, *Atkins*, R. 108), are Articles 58 (*Atkins*, R. 138), which deals with desertion, and 61 (*Atkins*, R. 138-139), which deals with absence without leave. Respondent could not bargain with representatives of the Auxiliary Military Police on these subjects.

Article V also contains in Section 2 (*Atkins*, R. 299) an agreement by the Company that there shall be no lockout. This also is not a subject of bargaining. The Respondent was required by the Army to permit the Army to install Auxiliary Military Police in its plant. It had no power to lock them out, and therefore could not bargain with the Union on that subject.

Section 3, of Article V (*Atkins*, R. 300), provides that the Company shall furnish uniforms and equipment to the Auxiliary Military Police. This had already been required by the Army in Paragraph 29 of its Regulations for Military Police. (Resp. Ex. 4, *Atkins*, R. 110.)

Article V, Section 4 (*Atkins*, R. 300), requires guards to be in the proper uniform and to be neat in appearance. The requirement not merely that the Respondent furnish these uniforms, but that the guards wear them, is contained in the same Section 29 of Respondent's Ex. 4. (*Atkins*, R. 110.)

Section 6, of Article V (there being no Section 5) provides for the use of Bulletin Boards by the Union. (*Atkins*, R. 300.) This is hardly a "condition of employment" as to which bargaining is guaranteed even to employees under the National Labor Relations Act.

Section 7, of Article V, of Board's Exhibit 102 (*Atkins*, R. 300), provides that age shall not be a disqualifying factor in the hiring or tenure of Auxiliary Military Police. This Section is based upon the underlying assumption that the enrollment of Auxiliary Military Police is within the control of Respondent. This is clearly not so as a matter of law or as a matter of practice. The appropriate War Department Regulations relating to discharge, quoted *supra*, deal also with employment and demonstrate that control of employment rests with the Army and not with Respondent. Not merely as a matter of regulation but also as a matter of practice the enrollment was by the Army. Ap-

plicants were enrolled in the Auxiliary Military Police as follows: They filled out application forms in Respondent's personnel office, which receives these forms on behalf of the Army. (*Atkins*, R. 54, 68, 91.) These were submitted with the recommendation of Respondent to the Army. (*Atkins*, R. 92.) The Army made an independent investigation of the applicants and enrolled them only if it approved them. (*Atkins*, R. 68, 71, 92.) This was in accordance with the applicable War Department regulation:

> "A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto." (Resp. Ex. 4, *Atkins*, R. 109.)

At the time a guard was enrolled, he was required by the Army to make, in writing and orally, an oath of allegience to the Constitution, and to make a written agreement with the United States to obey any orders issued in connection therewith by the President, as Commander-in-Chief of the Army and Navy of the United States, and by his duly authorized officers, and an acknowledgment that the appropriate Articles of War had been read and explained to him and that he was subject to military law. (Resp. Ex. 2, *Atkins*, R. 103-104, 54, 56 and 57.) This was required by the Army regulations. (Resp. Ex. 4, *Atkins* R. 105.)

If the Army saw fit to impose an age limit, no agreement by Respondent such as that contained in Article V, Section 7, of the proposed Collective Bargaining Agreement (*Atkins*, R. 300) could change that economic fact.

Article VI (*Atkins*, R. 300-301) relates to seniority and provides that promotion, preference to shifts, layoffs, recall and discharge shall be governed by the seniority of the particular member of the Auxiliary Military Police. It has

already been demonstrated that all of these conditions of work are controlled by the Army and not by Respondent. It is irrelevant that the Army uses merit and ability rather than length of service as a basis for determining these things. What is relevant is that the Army controls them with respect to these Auxiliary Military Police and Respondent could not bargain with respect to them because it would be powerless to carry into effect any bargain which it made.

Article VII, of Board's Exhibit 102 (*Atkins*, R. 301), provides that the management of the plant shall be vested exclusively in the Company, a proposition which surely is not subject to bargaining with a Union. It further provides that the right to hire, suspend, discharge, or transfer, and the right to lay off employees for lack of work or other legitimate reasons is vested in Respondent. This is essentially a repetition of other provisions in the proposed Collective Bargaining Agreement. With reference to those other provisions it has been demonstrated that it is the Army and not the Respondent which has control over these matters, and that, therefore, Respondent can make no effective bargain with respect to them.

Article VIII (*Atkins*, R. 301), entitled "War Department Regulations," justifies quotation verbatim in the Footnote.* It provides that during the war the Collective

---

*"Article VIII—War Department Regulations.

It is understood that for the duration of the war this Agreement is in all respects subject to the provisions of the Directives of the War Department concerning Military Organizations of the Plant Guard Forces (WD Directive, July 2, 1942, Ag 231.43; SOS Circular—, 1942; and any amendments thereto), and that nothing contained in this Agreement shall be construed in any way to interfere with the organization, efficiency, training, and control by the War Department of the Company Guard Force as an Auxiliary to the Military Police, nor to abrogate or interfere with the duties, responsibilities, and rights imposed by the War Department upon any employee in such Auxiliary Military Police." (Board's Ex. 102, *Atkins*, R. 301.)

Bargaining Agreement is subject to War Department directives, that the Agreement shall not interfere with the organization, efficiency, training and control by the War Department of the Auxiliary Military Police nor abrogate or interfere with the duties, responsibilities, and rights imposed by the War Department upon such Auxiliary Military Police.

It has been demonstrated that all of the subjects purported to be covered by the proposed Collective Bargaining Agreement are either within the control of the War Department and not of Respondent, or are covered by conditions and regulations imposed by the War Department upon Respondent and the Auxiliary Military Police. The effect therefore of Article VIII is to eliminate the purported effect of the rest of the proposed Collective Bargaining Agreement, and to establish by the terms of that Agreement, what was already so as a matter of law and economic fact, that there could be no collective bargaining between Respondent and the Auxiliary Military Police.

This provision in Article VIII has been argued by the Board as freeing the Collective Bargaining Agreement from any conflict with the powers of the Army and the duties of the Auxiliary Military Police to the Army. This it may do, but in so doing it plainly labels the proposed Agreement "empty."

Article IX, of Board's Exhibit 102 (*Atkins*, R. 301-302), deals with the circumstances under which Auxiliary Military Police are entitled to leaves of absence. Respondent could not grant to a member of the Auxiliary Military Police permission to suspend for a time the performance of the duties which he undertook as such a member. This comment applies with equal force to Article IX (*Atkins*, R. 302-303), dealing with the subject of vacations.

Article X (*Atkins*, R. 302) relates simply to the duration of the proposed Agreement.

The proposed Collective Bargaining Agreement has two Supplements which are also reprinted verbatim as part of Board's Exhibit 102 beginning on page 303 of the *Atkins* Record. Supplement No. 1 deals with the subject of hours, and purports to limit the hours which a member of the Auxiliary Military Police can be on duty, to define the shifts, and to provide additional pay for time in excess of the prescribed hours. The mission of the Auxiliary Military Police is defined by the appropriate War Department Regulations to be "to serve with the Army." (Resp. Ex. 4, *Atkins*, R. 106.) The plant guard identification card issued to each member of the Auxiliary Military Police identifies that the particular member "has been voluntarily and duly enrolled as an Auxiliary to the Military Police for service with the Army of the United States." (Resp. Ex. 3, *Atkins*, R. 104.) There surely can be no bargaining with respect to the hours or times at which those enrolled for service with the Army would perform that service. The Regulations provide, among other things, that such military service shall include "protection from air raid; fifth column activity; paratroop attack or invasion"; and that Auxiliary Military Police must wear certain insignia in order that they "will be recognized as legitimate troops and not deemed irregulars or guerrillas." (Resp. Ex. 4, *Atkins*, R. 106 and 110.) Under Supplement No. 1 to the proposed Collective Bargaining Agreement if the Auxiliary Military Police were called upon "as legitimate troops" to repulse "paratroop attack or invasion" they would be paid a certain rate during a regular shift, but at a rate increased to one and one-half times the regular rate if the battle extended beyond eight hours, or if it fell upon one of six named holidays, or if it fell upon the sixth day of service; and if it fell upon the seventh day of service these "legitimate troops" would be paid double time.

As a matter of both law and practice the hours and

shifts of these Auxiliary Military Police were set by the Army acting through the Chief of the Auxiliary Military Police. Thus it appears that Chief Johnston on his own authority rotated the shifts of the Auxiliary Military Police by a system which was contrary to the system established by Respondent for its own employees. (*Atkins*, R. 78-79.) His own hours were those of one "serving with the Army":

"Q. What are your hours of work?

A. My own hours?

Q. Yes.

A. I work whenever I think—I work whatever hours I think are advisable to work. They are very scattered and go all around the clock.

Q. You are paid overtime after eight hours in one day?

A. No, sir. I work on a straight salary basis. There is no cognizance at all taken of that when there are any extra hours.

Q. Do you on the average work more than eight hours a day?

A. Well—

Q. How much more?

A. Oh, on an average week after week, it might be ten hours—on an average week after week. Sometimes I work as high as sixteen and twenty and twenty-two, depending on the day and time and circumstances.

Q. But that is left to your own initiative as a military officer?

A. Yes, sir.

Q. Subject nevertheless to any orders you may get from higher authority?

A. Yes, sir." (*Atkins*, R. 79-80.)

Supplement No. 2 to the Board's Exhibit 102 deals with the subject of wages. The sole evidence on the rate of pay of the Auxiliary Military Police is contained in the testimony of Respondent's Personnel Director, Cyrus E. Wood, who testified that their rate was set pursuant to a

schedule filed by the Respondent with the Wage and Hour Division. Thus apparently the Army, acting with reference to the existing Wage Stabilization laws, orders and regulations, elected to leave the fixing of those rates to another branch of the Government, the War Labor Board and the Wage and Hour Division. The Army could have prescribed the wage rates, and the Respondent would have had to make payments at those rates, just as it paid the wage actually established "because the Government makes them pay." (*Atkins*, R. 82.)

It will not do to point out that the Wage Stabilization Law was temporary wartime regulation. Auxiliary Military Police were equally temporary establishments called forth by the exigencies of war. The fact is that wage stabilization machinery did exist when the Auxiliary Military Police were established, and the Army left the fixing of wages to that existing government machinery.

As has been said, the subjects covered by the contract proposed by the Union (Board's Ex. 102) are the same subjects which appear in almost every collective bargaining contract executed in this country. These things, wages, hours, seniority, grievance procedure, the union shop, no-strike, and no lockout clauses, discipline, discharge, layoff, recall to work, leaves of absence and vacations, are the subject matter of collective bargaining. These are the "rates of pay, wages, hours of employment, or other conditions of employment" with respect to which Respondent has been ordered to bargain with the Union by the Board. The purpose of the National Labor Relations Act, as stated in Section 1 of that statute, and as stated in the opinion of this Court in *National Labor Relations Board v. Hearst*, 322 U. S. 111, is to encourage collective bargaining and to protect the individual worker's freedom of organization and designation of representatives for bargaining in order to remedy the individual's inequality of bargaining power.

This Court has said in the *Hearst* case that these obstructions to interstate commerce, resulting from the refusal of employers to bargain collectively, and from the inequality of individual bargaining power, are the mischief which the statute is intended to correct; and that the end to be attained is the encouragement of such collective bargaining; and the remedying of such inequality, by protecting organization and representation. This Court said in the same decision that whether workers were "employees" within the meaning of that Act depended upon whether or not that mischief existed in the economic facts surrounding the relationship of those workers to the putative employer, and whether those ends could be attained by applying the machinery of the Act to that relationship.

It is clear that no obstructions to commerce can result from the refusal of Respondent to bargain collectively with these Auxiliary Military Police. Respondent cannot in law or in economic fact bargain with the Auxiliary Military Police either individually or collectively in respect to rates of pay, wages, hours of employment, or other conditions of employment. These subjects are not within the power of Respondent to change or affect. It could not set them unilaterally or by individual bargaining; it could not set them by collective bargaining. This being so, no inequality of bargaining power of the individual worker could cause such obstructions. These terms and conditions of employment were, in fact, set unilaterally by the Army through its representatives. It might be found that they were set by individual bargaining between the Army and the particular Auxiliary Military Policeman. But in any case they were not set by individual bargaining between the Auxiliary Military Policeman and the Respondent, or unilaterally by Respondent, and, therefore, the purpose of the Act to substitute collective bargaining for individual bar-

gaining for private employers is not here possible of achievement.

For these reasons, applying the doctrine of the *Hearst* case, these Auxiliary Military Police cannot be employees of Respondent within the meaning of that term in the Act. Since the subjects of bargaining are controlled by the Government of the United States, and since the Act gives no rights to workers with respect to the United States, these workers cannot be employees under the Act with respect to any person.

Chief of Guards Johnston Acted as Agent of the Army, Not of Respondent.

The Record was clear that much of the control over the Auxiliary Military Police, particularly with respect to hours, pay, promotion, discipline, assignment to shifts, recommendations for discharge, and orders as to particular work to be done, was in the hands of the two Chiefs of Guards. One of these, Henry A. Johnston, testified (*Atkins*, R. 68-84) as a witness called by Respondent. The guard called as a witness by the Union, Walter C Gann (*Atkins*, R. 52-63) served under Chief Johnston. It may be assumed that the facts as to Johnston were true also as to Chief Gann, who was at the other plant. There was no evidence, and there has been no contention, to the contrary.

Since so many of the activities deemed important as evidence of whether these Auxiliary Military Police were "employees" were carried on by Johnston, it is vitally important to determine for whom Johnston was acting. Was he doing these things as a representative of Respondent, or as a representative of the Army?

In briefs filed at earlier stages of this proceeding the

Board has assumed, without explicit statement, that the Chief represented Respondent. From this assumption flowed many of the Board's errors. In the present Brief before this Court, the Board has finally argued the point, more, however, by assertion than by demonstration from the record.

An examination of the record makes it abundantly clear that the Chief of Guards was at all times acting at the direction of, and on behalf of, the Army. His acts, and his control over the Auxiliary Military Police, were the acts and control of the Army.

First, let it be clear that there has been no finding by the Board on this subject. The only reference to the Chief in the Board's Decision and Order was the following:

> "According to Chief Guard Henry A. Johnston, a witness called by the respondent in the hearing in the representation case, he is in command of all the guards at one of the plants and works 'very closely' and 'cooperates' with the respondent's representatives. Moreover, Johnston admitted that the respondent could temporarily suspend a guard from duty." (*Atkins*, R. 31.)

The facts as to the capacity in which the Chief acted can be found only in the evidence.

There is no dispute that Chief Johnston was himself a member of the Auxiliary Military Police. He applied for enrollment like anyone else at the Respondent's personnel office, and "was given to understand that then when I filled the application that it would not be effective without the approval of the United States Government." (*Atkins*, R. 68.) He was investigated by the Military Authorities (*Atkins*, R. 71) and not by Respondent, and was sworn in as a Military Policeman (*Atkins*, R. 69). The Army then issued to him a "Plant Guard Identification Card" (*Atkins*, R. 69) which appears in facsimile as Respondent's Exhibit 3 (*Atkins*, R. 104).

That Plant Guard Identification Card is reproduced on the opposite page.

He was required to sign an Agreement with the United States of America (Resp. Ex. 2, *Atkins*, R. 103-104), after which he was a representative of the Government in the plant:

> "A. Well, that exhibit there is signed by the guard, the member of the Auxiliary Military Police. He is not yet a member. He signed that agreement and oath with the United States and that in turn is immediately forwarded to the Continuous Security District Office and then this pass is issued upon receipt after thorough checking has been given. It's issued on that contract. When you receive this pass then you know that you have been *accepted by the Government as one of their representatives in the plant.*" (Emphasis supplied.) (*Atkins*, R. 70.)

He received a Certificate of Enrollment in the Auxiliary Military Police of the Army of the United States:

> "UNITED STATES OF AMERICA.
>
> Auxiliary Military Police.
>
> Army of the United States.
>
> Certificate of Enrollment.
>
> This is to Certify that Henry Adams Johnston has been voluntarily and duly enrolled as an Auxiliary to the Military Police with the rank of ..... for service with the Army of the United States at E. C. Atkins & Company, Indianapolis, Indiana, and is subject to Military Law for the duration of the War or until the earlier official termination by the War Department of his services as an Auxiliary to the Military Police.

Respondent's Exhibit 3

Information on Reverse Side Certified as Correct

Signature of Company Official

Name and Title

UNITED STATES OF AMERICA
AUXILIARY MILITARY POLICE
ARMY OF THE UNITED STATES
PLANT GUARD IDENTIFICATION CARD

This is to Certify that Henry A. Johnston has been voluntarily and duly enrolled as an Auxiliary to the Military Police for service with the Army of the United States at E.C.Atkins & Co., Indianapolis, Ind., and is subject to Military Law for the duration of the War or until official termination by the War Department of his services as an [illegible].

For the Commanding General, Fifth Service Command

Date 8-3-43

Serial No. 105-ATE-016

B. R. WETENHALL
Capt. C. M. P.
District Plant Guard Officer
Cont. Secty. Dist. Off. Cincinnati, O.

Property of War Department:—To Be Returned to This Office Upon Termination.

BIRTH DATE	HEIGHT	WEIGHT	EYES	HAIR	COMPLEX	RACE
5-26-06	5'10½"	155	Blu	Brn	Fai	W

SCARS OR MARKS Rgt. Elbow, skin
[illegible] Lft. Caulifl. ear
wears glasses -or- [illegible]

Fingerprinted 8-24-42

U. S. Citizen by: Birth

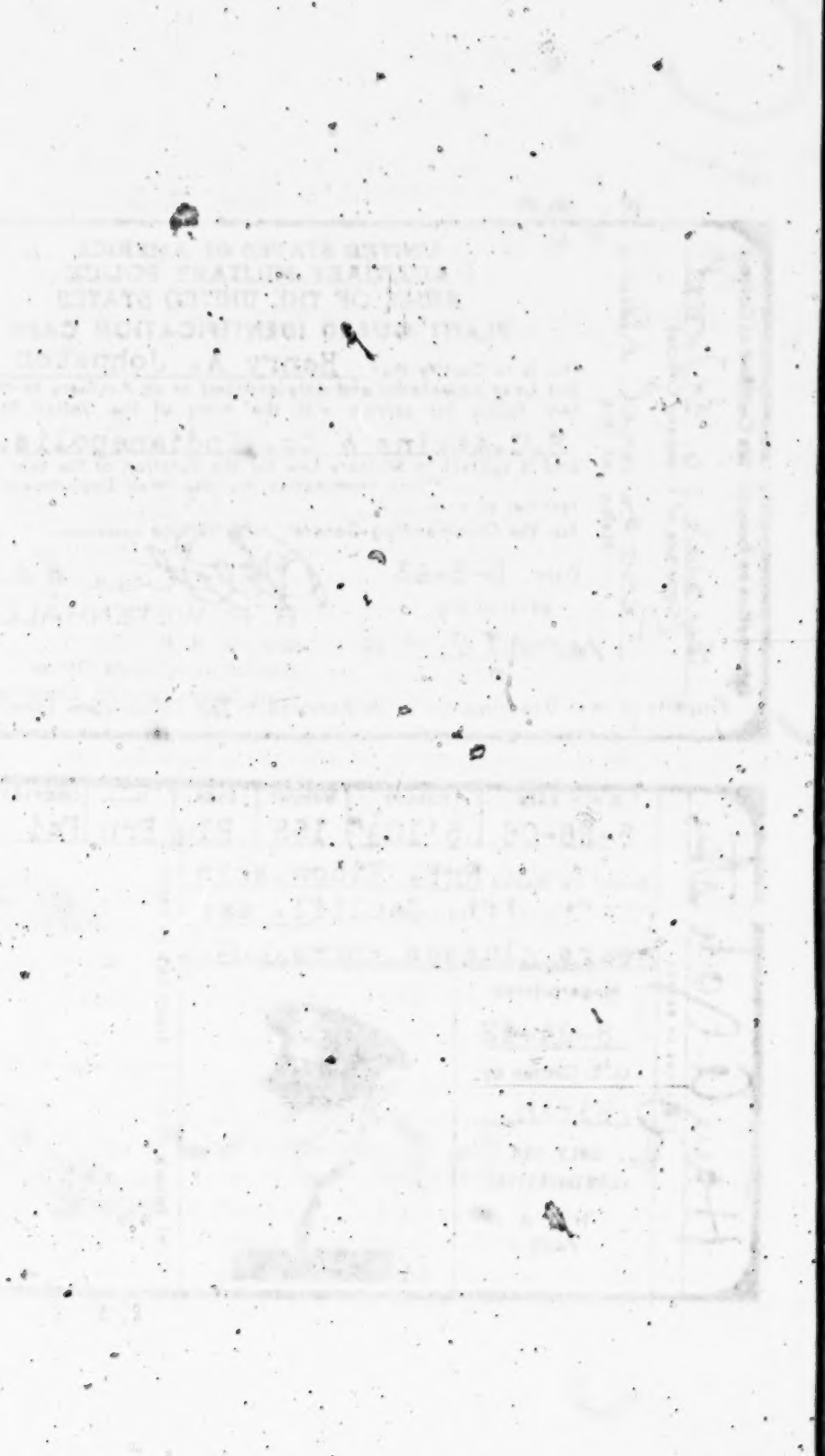
ONLY FOR IDENTIFICATION

NOT A PASS

RIGHT THUMB PRINT

LEFT THUMB PRINT

Henry A. Johnston
SIGNATURE OF BEARER



For the Commanding General, Fifth Service Command:

Dated 29 June 1943.

A. C. RASMUSSEN,
A. C. RASMUSSEN,
Lt. Col., Ord. Dept., Chief, Continuous Security District Office, Cincinnati, Ohio.

Official:

B. R. WETENHALL,
B. R. WETENHALL,
Capt., C.M.P., District Plant Guard Officer, Cont. Secty. Dist. Off., Cincinnati, O."

(Resp. Ex. 6, *Atkins*, R. 115-116.)

Chief Johnston received *all* of his orders from the Army, and none of them from Respondent. He received three "general orders."

"Q. Now, how do you receive the general orders for your duties, from what source?

A. General orders are received from Capt. Wetenhall of the Fifth Service Command, Cincinnati."

. . . . .

"Q. I now show you Employer's Exhibits Nos. 10, 11, and 12 and ask you what they are.

(Whereupon, the documents above referred to were marked for identification as 'Employer's Exhibits 10, 11, and 12.')

A. These are general orders from Capt. Wetenhall of the Fifth Service Command District Plant Guard Officer, who is over all the Auxiliary Military Police in this District. These three orders take up different subjects and they are to be followed." (*Atkins*, R. 73.)

He passed these orders on to this subordinates by having them photostated and enlarged four times (*Atkins*, R. 73).

The Chief of Guards was instructed to enforce orders

by the Army. He reported all violations of orders to the Army, and not to Respondent:

> "Q. Referring to Employer's Exhibit No. 11, I call your attention to the third General Order 'to report all violations of orders I am instructed to enforce.'
>
> A. That's right.
>
> Q. To whom do you report such violations? What do you do under that order?
>
> A. I would report any violation, any serious violation, to Capt. Wetenhall of Cincinnati." (*Atkins*, R. 75.)

He took his orders from the Army and not from Respondent or Respondent's officials:

> "Q. And who instructs you to enforce orders?
>
> A. It would be the government.
>
> Q. Do you take any orders from Mr. Wood who sits here in the court room and is the personnel director of E. C. Atkins and Company?
>
> A. Yes, naturally; I work very closely with Mr. Wood, as he is personnel director of the plant and there can be much more efficient guarding of the plant and operation of the plant if we do work closely. I have never taken an order as such from him.
>
> Q. You try to cooperate?
>
> A. I try to cooperate to the best of my ability and he does the same for me." (*Atkins*, R. 75.)

Note that the above was the testimony that Chief Johnston worked "very closely" and "cooperated" with Mr. Wood, which the Board found so significant that it quoted it in its findings. (*Atkins*, R. 31.) The inference is not, however, obvious. Does the Board feel that one who was a member of the Army would not "work very closely" and "cooperate" with the officials of a war contractor at whose plant he was stationed? Are antagonism and obstruction necessary incidents of absence of the employee relationship? The Seventh Circuit Court of Appeals gave a sufficient answer when it said: "We should think that the

exercise of ordinary common sense would require co-operation between the military and the management, but that fact certainly can form no basis for an inference that respondent exercised control." (*Atkins*, R. 358.)

The Chief of Guards repeated his testimony as to lack of subordination to Respondent's officials under cross-examination by counsel for the Union:

"Q. Suppose Mr. Atkins came out and gave you an order. Would you obey that?

A. I never got an order.

Q. If you did, would you obey that order?

A. Well, I wouldn't consider it an order, in the first place. If I could oblige him in any way, without violating federal orders, I would do my best to co-operate with him, but I wouldn't have an order from him in the first place." (*Atkins*, R. 82.)

Chief Johnston was given weekly instruction by the Army, as were the other Auxiliary Military Police:

"Q. Will you now kindly tell us a little bit more about the kind of instruction which you and your men under your command have received from the Military Police and where that instruction was imparted?

A. Once a week on a Monday at the Ipaco on 16th and Alabama Street, we get one hour of instruction at the hands of the United States Army Corps of Military Police. That instruction is taught by a second lieutenant of the Military Police, under the direction of Capt. Wetenhall and his superior, Col. Rasmussen of the Continuous Superior District and subjects taken up are Military Police subjects only and attendant subjects. For instance, we have had a lot of instruction on judo, which is the art of self-defense. We have had instruction on the use of clubs and fists. We have had guiding law of instruction on pistol marksmanship and the general handling and care of them. We have had instruction on military courtesy by training films, methods of arrest by training films, and of disarmament of persons by training films, which are the property of the army and borrowed from the fort at Ft.

Harrison in the state here and returned by the lieutenant. They used sighting bars which are the property of Ft. Harrison showing the men how to sight their pieces (hold revolvers) for accuracy, and also there are other subjects such as fire control and prevention. That will give you a general idea. Some of the other subjects I can't recall just now. All Military Police subjects, every one of them. We have also had close order drill, regular army close order drill on the floor, administered by the lieutenant and his assistants in which we all took part." (*Atkins*, R. 79.)

Chief Johnston felt that his obligations were to the Army, and not to Respondent:

"Q. What would you do if you found Mr. Wood tampering with machinery or personnel or committing sabotage?

A. Well, in a case like that, I would just turn him in, like anybody else. I would arrest him and turn him in because I am sworn to do that. I have sworn an oath.

Q. Would you do the same with the president of the company?

A. Yes, sir; I would.

Q. And you own no responsibility to the president or any director of the company which would make you violate your oath to the Military?

A. No, sir; there is no reason for that." (*Atkins*, R. 80-81.)

Johnston received all his instructions, and made all of his reports, orally and by correspondence with Captain Wetenhall and Lieutenant Scanlon of the Army. In addition to the testimony already quoted herein, further testimony by Johnston on that subject appears in the footnote[7].

[7] "Q. Do you have the right to recommend them for promotion or discharge? Do you do that?

A. I recommend a man for discharge but I don't discharge him myself.

Q. You have the right to recommend him for discharge?

A. Yes, sir.

Trial Examiner Shroyer: While on the subject, to whom do you recommend?

Chief Johnston clearly manifested his understanding that he was not a representative of Respondent, but that he was a representative of the Army. Thus in speaking of discharges he said:

"A. The Military discharges him from the Auxili-

The Witness: To Capt. Wetenhall, Cincinnati, who does the discharging." (*Atkins*, R. 81.)

"Q. In connection with your administrative duties, do you carry on any correspondence with Mr. Wood or any officials of the plant?

A. No, sir.

Q. Do you carry on any correspondence with the Cincinnati office of the Military?

A. Yes, sir.

Q. With Captain Wetenhall?

A. Wetenhall's office.

Q. Do you have before you there the file of that correspondence?

A. Yes, sir; I think it is here.

Q. And that file is about one inch thick now?

A. Yes, sir.

Q. And contains onion skin carbon copies of your letters to Wetenhall and original letters from Wetenhall to you?

A. That's right.

Q. About how often do you write him affecting your duties, responsibilities, and requests for instructions from him?

A. On an average probably of twice a week, is all.

Q. You ask him both for general orders and for specific instructions?

A. Yes; or I might on a small case instead of writing Capt. Wetenhall, I might talk it over with his assistant, Lt. Scanlon in the City of Indianapolis, who lives here.

Q. That wouldn't require correspondence?

A. No.

Q. You could conduct by telephone, too?

A. Yes.

* * * * *

Q. If a man is drunk on duty have you the right to discharge that man?

A. I couldn't discharge him legally; no sir.

Q. Could you suspend him?

A. I would merely suspend him from duty as of the minute I saw him in that condition.

Q. What would be your next step?

A. To sit down and write Capt. Wetenhall a letter and I would recommend his discharge from the Military Police." (*Atkins*, R. 83-84.)

ary Military Police. Now there is one thing that should be said there. He can be relieved of his duty temporarily by myself *or* by E. C. Atkins and Company, problematically for breaking some rule or otherwise proving that he is not doing his duty; he could be relieved temporarily but he could not be discharged by E. C. Atkins and Company." (Emphasis supplied.) (*Atkins*, R. 72.)

And he felt that his subordinates in the Auxiliary Military Police were required to obey his orders, as coming from a representative of the Army, and not those of representatives of Atkins:

"Q. Do any of the Military Police under your command take any orders from any officer, director, or agent of the Atkins company as such?

A. No; they wouldn't take any orders. Just like myself, they would cooperate in any way they could, but they would only—

Q. Suppose such cooperation involved deviation from such specific order which you had to give. Would they follow your specific order or would they cooperate?

A. They would—that would be their orders—to follow mine; yes, sir." (*Atkins*, R. 78.)

The Chief of Guards had ample reason from the Army itself to believe himself a representative of the Army and not of Respondent. The War Department's Plant Protection Data Binder, Section V, Letter 1, Dated June 7, 1943 (Resp.'s Ex. 4) states in paragraph 36:

"*The Auxiliary Military Police are agents of the Federal Government* and will not be subject to any state or municipal requirement which conflicts with their war time duties." (Emphasis supplied.) (*Atkins*, R. 111.)

The foregoing examination of the evidence shows clearly that the Chief of Guards was acting for, and received his powers from, the Army. He could not have been acting

for Respondent. For one thing, he obviously did not intend to act on behalf of Respondent; to represent Respondent, or to exercise any powers derived from Respondent. To hold that he was Respondent's representative would be to make him such completely, unwillingly and unknowingly.

For another thing, he received no orders, delegations or manifestations of authority from Respondent. He did receive such orders from the Army, reported his actions and decisions to Captain Wetenhall and Lieutenant Scanlon, and sought instructions from them.[8] In its present Brief the Board attempts to explain the complete lack of such consultation with Respondent by speaking of "the plenary authority which respondent Atkins vested in the chief guard." There is no evidence whatever of such authority being delegated. The illustrations which the Board gives concern Chief Johnston's final authority to promote guards to the rank of lieutenant, and to establish a system of rotating shifts. If these things had been subject to control by Respondent, which had a personnel department handling relations with over 1200 employees, it is incredible that there would be such "plenary authority" in Chief Johnston. His close contact with his Army superiors and his lack of control by Respondent demonstrate anew the obvious fact that he was acting for the Army as its representative, and was not the agent of Respondent.

Respondent's Personnel Director, Cyrus E. Wood, also testified that Respondent could give no orders to the Auxiliary Military Police. He had no control over Chief John-

[8] "Q. About how often do you write him (Captain Wetenhall) affecting your duties, responsibilities, and requests for instructions from him?

A. On an average probably of twice a week, is all.

Q. You ask him both for general orders and for specific instructions?

A. Yes; or I might on a small case instead of writing Capt. Wetenhall, I might talk it over with his assistant, Lt. Scanlon in the City of Indianapolis, who lives here." (*Atkins*, R. 83.)

ston in matters of discipline, they being handled by Colonel Rasmussen of the Army.[9]

From all of the foregoing it is apparent that

(1) Chief Johnston believed he was acting for the Army and not for Respondent;

(2) Chief Johnston purported to exercise authority derived from the Army and did not purport or intend to exercise any authority derived from Respondent;

(3) Chief Johnston received orders and instructions from the Army, and received no orders or instructions from Respondent;

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[9] "Q. Is his (Chief Johnston's) testimony with respect to your being permitted to make recommendations but not being permitted to give orders respecting the duties of the Auxiliary Military Police correct?

A. It is correct.

Q. You have been able to work in cooperation with the Auxiliary Military Police?

A. We have; yes.

Q. Have you ever attempted to exercise any of the authority which you are prohibited from exercising by military orders over any of these sixty-four members of the Military Police?

A. Not to my knowledge.

Q. Or has any foreman or hiring officer or director of Atkins and Company attempted to exercise such a right?

A. No.

Q. Instructions have been promulgated, have they not, throughout the entire plant that the Military Police a the business and affairs of the military authorities?

A. That's correct. It is understood, sir." (*Atkins*, R. 89-90.)

• • • • •

"Q. What would you do, Mr. Witness, if one of the Auxiliary Military Police came to you and protested to any action of a disciplinary nature by Chief Johnston?

A. Report that to the proper authorities, in this case to Col. Rasmussen in Cincinnati. He is the man that my office deals with when necessary.

Q. You would take no jurisdiction yourself?

A. No; not without instructions from Col. Rasmussen.

Q. You do, whenever matters of discipline are taken up in your plant get confirmation of any instructions which Col. Rasmussen or Capt. Wetenhall sent to Chief Johnston or to Chief Haun, is that right?

A. That's right." (*Atkins*, R. 90.)

(4) Respondent did not believe it could give orders to Chief Johnston or intend to give such orders; and

(5) the Army said "The Auxiliary Military Police are agents of the Federal Government."

It is clear that the control exercised by Chief Johnston cannot be imputed to Respondent. The Board did not so find, and such a finding would not be supported by evidence.

IV.

The Board Erroneously Assumed That This Case Fell Into a Category Which the Board Had Prejudged.

The authority of the Board to find a person guilty of an unfair labor practice and issue an order against him rests upon the following provision of Section 10 (c) of the National Labor Relations Act:

> "If *upon all the testimony taken* the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." (Emphasis supplied.)

It is, therefore, the duty of the Board to decide each case upon the evidence *in that case*. And it is the duty of the Circuit Court of Appeals to set aside the Board's order if the Board's order is not supported by its findings, or if its findings are not supported by the evidence *in that case*. (National Labor Relations Act, Section 10(e).)

It is submitted that the Board in this case never focused upon the facts of this case at all, but upon hearing

the words "militarized plant guards" assumed that the facts and issues were the same as in all other cases involving militarized plant guards. That was a category in the mind of the Board. It had a policy for cases in that category. It applied that policy to this case without ever hearing the facts and issues sufficiently distinctly to realize that this was not what the Board has called a "typical plant guard case." (Petition for Writs of Certiorari, Nos. 418, 419, p. 24.)

In the Board's Decision and Direction of Election (*Atkins*, R. 5-8) in the representation case, there were no findings of fact whatever on the relationship between these Auxiliary Military Police and this Respondent. The Board seemed unaware of the testimony actually taken in this case.[10]

The Trial Examiner, in the unfair labor practice case, simply quoted part of the same language the Board had used in the representation case. (*Atkins*, R. 35.)

The Board itself, in the unfair labor practice case, adopted that "finding" of the Trial Examiner, and added some other and more specific findings which, as the Circuit Court of Appeals found, have no support in the evidence. These findings lack support in the evidence largely because the Board was not looking at the evidence, but was prejudging the case because it was labelled "militarized plant guard" and was fitted into a category on which the

[10] All the Board said was "The Company agrees with the scope of the unit but contends that such a unit is not an appropriate one since plant guards, who are all auxiliaries of the military police, are not employees within the meaning of the Act. This contention has been advanced in other cases and has been found untenable. More recently, in the Dravo Corporation case, the Board fully discussed the question as to whether the militarization of guards alters the character of their employment, stating therein that the relationship of employer and employee still exists despite such militarization. No facts or arguments are presented here which would warrant departing from our prior decisions; accordingly, the Company's contention is rejected." (*Atkins*, R. 7.)

Board's mind was already closed. This is apparent from its statement of Respondent's contention:

> "The respondent contends that the guards involved in this proceeding *are no longer* the respondent's employees, but are employees of the United States of America by reason of *having become* civilian auxiliaries of the Military Police." (Emphasis supplied.) (*Atkins*, R. 31.)—

A foundation stone of Respondent's case has always been the fact that these guards were *never* its employees. They were not a guard force existing as employees of Respondent who were thereafter militarized. They were a force created by and at the direction of the Army. Respondent made this position plain in its Answer to the Board's Complaint[11] and urged it in its briefs and arguments. Apparently the Board was neither listening nor reading. The Board had classified the case, and decided it by classification, before the testimony was received.

At every stage of the proceeding since, the Board has asserted this position. It refers at every turn to some 135 other cases involving militarized plant guards, and

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[11] Respondent's Answer contained the following:

"13. The Respondent further alleges that the Respondent is not, and cannot be, an employer within the meaning of Section 2 of the National Labor Relations Act, or any of its subdivisions, with respect to the 'plant guards' referred to in the Complaint, because all of them were 'auxiliary military police' under the jurisdiction and control of the Continuous Security District Office of the War Department of the United States of America, located in Cincinnati, Ohio; and because all such 'auxiliary military police' were in the Federal Military Service at all times alleged in the Complaint." (*Atkins*, R. 294.)

* * * *

"15. The Respondent further alleges that the relationship of employer and employee, with its various incidents, *has never existed* as between the Respondent and the plant guards referred to in the Complaint, and that consequently the relationship between the Respondent and such plant guards is not subject to the jurisdiction of the National Labor Relations Board under any of the provisions of the National Labor Relations Act." (Emphasis supplied.) (*Atkins*, R. 295.)

holds them to have foreclosed this case, although an examination of those cases shows them to be different, in facts and in issues, from the present case. Thus in the Board's Brief in the present case it says:

> "Shortly after the militarization program was instituted the National Labor Relations Board, in cases coming before it, recognized that militarized plant guards constituted a *generic employee-category*, and that the incidents of their employment, and their relation to the military did not vary materially from plant to plant." (Emphasis supplied.)

In a footnote at this point in its Brief, the Board again refers to its "collection of more than 135 cases." Because of the importance the Board attaches to these 135 cases, in which the Board has recognized militarized plant guards as a "generic employee-category" whose incidents of employment and relation to the military did not vary materially, it is worth examining the Board's contention with respect to them, and comparing them with the present case. Such examination will show that the case at bar does differ materially in its vital facts from the 135 cases, and that the principal issue in this case was not raised in them.

One of the principal arguments of the Board, both in the Circuit Court of Appeals and in this Court, has been based upon an alleged fixed policy of the Board with respect to collective bargaining by militarized plant guards. The Board says that it has given careful consideration to the problems involved respecting such militarized plant guards and has embodied the results of that consideration in this consistent body of 135 decisions, all holding that militarized plant guards are "employees" under the Act and are entitled to bargain collectively.

The Board is saying both that the Court should be guided by its administrative expertness represented by

these 135 decisions, and also that the Court should be reluctant to overturn a body of law so widely established.

The Board can make this argument only because it fails to appreciate the issue in the present case. The Board has, as it says in its Brief, "recognized that militarized plant guards constitute a *generic employee-category*, and that the incidents of their employment and their relation to the military did not vary materially from plant to plant." The Board, therefore, has assumed, without discrimination, that the present case fitted into that category of cases, and has assumed, without examining the facts of the present case, that the incidents of the employment of these guards and their relation to the military were the same as those in the 135 cases to which the Board adverts.

The Board has failed to realize that the Respondent has raised in the present case an issue which was never raised or considered by the Board in those other cases, and that this issue is firmly founded upon facts in the present case which did not exist in those other cases.

To appreciate this it is necessary to distinguish the contention of the respondents in those other cases from the contention which the Respondent is making in the case at bar. In the 135 cases the companies were not denying that, as a matter of common law, and in any ordinary sense, the guards were the "employees" of the companies. The employers rather were pointing to the language of Section 2(2) which defines "employer" to include any person acting in the interest of an employer. They argued that plant guards, like supervisory employees, acted in the interests of an employer and, therefore, were not subject to collective bargaining. Sometimes they stated that, because these guards were "employers" within Section 2(2), therefore they could not be "employees" within Section 2(3); while at other times they stated merely that those

who were acting in the interest of management were not proper subjects of collective bargaining within the purposes and policies of the Act. Those employers were trying to get plant guards within the rule to that effect which the Board adopted for supervisory employees in *Maryland Drydock Company*, 49 NLRB 733, but has since abandoned.

This is a very different argument from that which is made by Respondent. Respondent contends, and the testimony shows, that the Auxiliary Military Police at its plant were not its employees in any sense. It points out that there were none of the common law indicia of the employment relationship. It points out further that the economic facts, which were referred to in *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, as the test of the word "employee" under the Act, here plainly show that these Auxiliary Military Police were not employees of Respondent. Respondent particularly emphasizes that it had control over none of the ordinary subjects of collective bargaining and that, therefore, ordering collective bargaining with these Auxiliary Military Police would neither promote collective bargaining nor correct any supposed inequality of bargaining power.

This issue which Respondent has raised, and upon which the Circuit Court of Appeals for the Seventh Circuit refused to enforce the Board's Order, is not present in the 135 cases to which the Board adverts. Those cases, therefore, do not reflect any prior Board consideration of this issue, nor do they reflect any settled body of law founded upon the administrative expertness of the Board. Rather than having considered this issue the Board, in the early stages of the proceeding, was unable to focus its mind upon it sufficiently to recognize its existence.

This brief speaks of this issue as having been raised by Respondent. It was, of course, raised rather by the

plain facts contained in the record in this case. This case presents a fact situation which is utterly different from the fact situations presented by the 135 cases. It is the Board's preconception that this is a "generic employee-category" and that "the incidents of their employment and their relation to the military" were always the same, which has kept the Board from realizing the obvious differences in the facts in this case.

One primary difference between this case and the 135 is the fact that there was no plant guard force at Respondent's plant existing before militarization. In the 135 cases there was a plant guard force which obviously stood in a relationship which, at least at common law, was an employment relationship to the companies. In those cases the Army or the Navy superimposed the status of Auxiliary Military Police upon that existing relationship without disturbing it very much. The economic facts of the relationship continued the same. The activities carried on by the guards continued to be carried on on behalf of the plant owners. The plant owners in those cases, as the Board regularly found, continued to control hiring, firing, promotion, wage rates, discipline, seniority, and all of the other conditions of employment.

In the Respondent's situation the facts were utterly different. Respondent had no plant guard force. Respondent had a few watchmen who occupied "pensioners' jobs" and who did not perform the functions or exercise the powers which the Auxiliary Military Police exercised. This Auxiliary Military Police force was created as a new thing by, and at the direction of, the Army of the United States. The functions which it performed were different functions. It never established a relationship with Respondent giving Respondent control over any of the terms or conditions of employment. Rather all of

these terms and conditions of employment were substantially controlled by the Army. The actual operations of the Auxiliary Military Police were conducted on behalf of the Army and not on behalf of Respondent, and were directed by the Chief of Guards who acted solely for the Army and not for Respondent. This is amply demonstrated in Parts II and III of this brief.

The detailed and careful review of the facts contained in the first opinion of the Circuit Court of Appeals amply demonstrates this distinct fact situation which existed in none of the other 135 cases.

Typical of the 135 cases is *Matter of Dravo Corporation*, 52 N. L. R. B. 322, which was the case cited in the body of the Board's Decision and Direction of Election, and which the Board has selected for special mention out of the 135 cases at each subsequent stage of this proceeding. It is worth examining to show the wide difference, factually and in law, between the present case and the 135.

In *Matter of Dravo Corporation*, 52 N. L. R. B. 322, the guards were enrolled members of the Coast Guard Reserve. There was no evidence that the force was born of the war. They were hired and paid by the Company, which was reimbursed by the Navy for its expenditures. The Company set their wage rates subject to the approval of the Navy. They were subject to the Articles for the Government of the Navy, the general orders of the Supervisor of Shipbuilding of the Navy, and the discipline of the Coast Guard, but were "answerable to the Company for the proper discharge of their duties." They had no duty or responsibility for any misconduct observed beyond reporting it to a production foreman, or, if it did not require immediate attention, reporting it to the chief guard. They were attached to the Company's Safety Department. There was no finding as to who could pro-

mote, discharge, fix hours and shifts, and affect other conditions of employment.

The Dravo Corporation's contention was "that the plant-protection employees are a part of management" (52 N. L. R. B. 322 at 326); that they "perform managerial functions which are delegated to them by the Company's Board of Directors." (52 N. L. R. B. 322 at 326.) In this it was saying simply that the guards were supervisory employees. It also contended that they could not be represented by the same union that represented other employees. But it nowhere contended that the guards lacked all employment relationship to the Company because neither hired, paid, promoted, discharged, disciplined or directed by the Company. It could not make that contention, because those facts were not in the *Dravo* evidence.

Therefore the *Dravo* case is distinct on its facts from the case at bar, and the main issue in the case at bar was not in issue there. If the *Dravo* ca[illegible] is typical of those in which the Board discovered the "generic employee-category" of "militarized plant guard," the incidents of whose employment and whose relationship to the military did not vary materially from plant to plant, then it was obvious error to put the case at bar in that category.

The Company's contention in the *Dravo* case reflected the conflict in Board theory as illustrated by *Matter of The Maryland Drydock Company*, 49 N. L. R. B. 733, and *Matter of The Maryland Drydock Company*, 50 N. L. R. B. 363. In the First *Maryland Drydock* case the Board held that, although supervisory employees were "employees" as defined in Section 2(3) of the Act, it would not effectuate the purpose of the Act to certify them as collective bargaining units. In the Second *Maryland Drydock* case the attempt was made to reach the same result as to

plant-protection employees. The Board there rejected the contention that plant guards were supervisory.

In the *Dravo* case the Company was contending that its plant guards should be treated as supervisory employees under the First *Maryland Drydock* case. It nowhere contended that they were not employed by the Dravo Corporation, but only that they represented management. It admitted that they were employees, but contended that they were supervisory.

It is, therefore, submitted that the Board's Order in this case is invalid because it is not founded "upon all the testimony taken" in this case but upon an erroneous assumption that this case falls into a class of cases which are actually dissimilar. It is further submitted that the action of the Circuit Court of Appeals in setting aside the Board's Order does not conflict with a settled policy of the Board founded upon consideration in numerous other cases since those cases involve a different issue and the issue in the present case has not previously been considered by the Board.

V.

The Circuit Court of Appeals Properly Found That the Board's Findings of Fact Were Not Supported by Evidence.

1. The Scope of Judicial Review.

The scope of judicial review of Board orders is limited by the provision, in Section 10(e) of the Act, that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive."

This has been held by this Court to mean that the findings must be supported by "substantial evidence"; and

that "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Company* v. *National Labor Relations Board*, 305 U. S. 197, 229; *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299.

In *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376, this Court said "The judicial review afforded is not for the purpose of weighing the evidence upon which the Board acted and perhaps to overrule the exercise of its discretion but to 'guarantee against arbitrary action by the Board.'" For this quotation this Court cited S. Rep. No. 573, 74th Cong. 1st Sess. p. 14.

In *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 130, this Court said:

> "Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record."

2. The Circuit Court of Appeals Observed the Limitations Upon the Scope of Its Reviewing Powers.

The Board charges the Circuit Court of Appeals with disregarding these rules in reviewing the Board's findings of fact. It is submitted, rather, that the Court observed them scrupulously.

The Court began by stating the rule which was to be its guide, including in its statement the foregoing quotation from the *Hearst* case:

> "We are of the view, also, that the findings contained in its decision in the unfair labor practice case, if substantially supported, are sufficient to support its order. In studying this record for the purpose of

ascertaining if such support is present, we are not unmindful of the admonition so often repeated that a court is not permitted to weigh the evidence and substitute its judgment for that of the Board. As stated in the recent case of *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 130:

> 'Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record.'" (*Atkins*, R. 349.)

* * * * * *

"Therefore, we are of the view that the decision in the Hearst case requires rather than precludes a review of the facts in the instant case, with a view of ascertaining if they reasonably support the Board's order." (*Atkins*, R. 350.)

The Court then stated verbatim the Board's findings. It is important to remember that these are *all* of the Board's findings relative to whether the Auxiliary Military Police were employees of Respondent:

"The material findings upon which the Board's order must rest are:

> 'The record shows that the guards are interviewed for employment by the respondent and not by the United States of America, and are hired by the respondent; that their discharge is ordinarily initiated by the respondent; and that during their employment they are paid by the respondent, at rates set by the respondent, and not by the United States of America. According to Chief Guard Henry A. Johnston, a witness called by the respondent in the hearing in the representation case, he is in command of all the guards at one of the plants and works "very closely" and "coooperates" with the respondent's representatives. Moreover, Johnston admitted that the respondent could

temporarily suspend a guard from duty. Cyrus E. Wood, the respondent's personnel director, who corroborated Johnston's testimony as related above, referred to the guards at the plants involved as the respondent's employees, and further testified that the respondent makes the "necessary pay roll deductions" before paying them their wages.

"* * * It is true that for reasons of national security the respondent may have surrendered to the military authorities many of the attributes of control which it would normally possess over its plant guards. It is clear, however, that the respondent still retains a sufficient residual measure of control over the terms and conditions of employment of the guards so that the guards should not be deprived of the rights guaranteed in the Act.'" (*Atkins*, R. 354.)

The Court then listed the four elements contained in the Board's finding:

"It is important in this connection to note the test which the Board utilized as a basis for its finding of the existence of the employer-employe relationship. The test includes four incidents: (1) the guards were paid by respondent; (2) they were hired by respondent; (3) they could be discharged by respondent; and (4) the control exercised by respondent." (*Atkins*, R. 354.)

The Court then examined the evidence carefully as to each of these elements to see if it contained support for them:

(1) *The Board's finding that the guards were paid by Respondent.* With respect to this the Court's opinion contained the following:

"The incident most strongly emphasized is that they were paid by respondent. Undoubtedly, this is

the most important incident common to the employer-employe relationship. In the instant case, however, it is, when viewed in connection with the attending circumstances, largely minimized if not entirely obliterated. Payment of these guards by respondent, in fact their employment, was a requirement imposed by the government as a prerequisite to respondent's right to engage in the manufacture of war material. It had no option to pay or not pay; neither did it have any option to employ or not employ. Chief Johnston, when asked why the guards were paid by respondent when their orders were received from the military authorities, stated an incontrovertible fact: 'They pay because the government makes them pay.' It must be assumed, so we think, that respondent was reimbursed by the government for all costs incurred in the manufacture of war material, including that of compensation paid to the guards. In reality, under such circumstances, as bearing upon the employer-employe relationship, we are of the view that it makes no difference whether they were paid by respondent or by the government.

It is also well to keep in mind that this guard force was born of the exigencies of war. None of them (with the exception of the four original watchmen) had theretofore been employed at respondent's plant. They were employed at the command of the government and the purpose of their employment was, as stated in the President's proclamation, 'to protect from injury or destruction national-defense material, national-defense premises, and national-defense utilities,' or, as stated in the agreement which the plant guard was required to sign with the government, 'to protect war material, war premises, and war utilities against all enemies, foreign and domestic.' In 'Plant Protection Data Binder' dated June 7, 1943, the mission of a guard force is stated to be twofold: (a) 'to provide interior and exterior protection of the plant against sabotage and espionage and natural hazards,' and (b) 'to serve with the Army in providing the pro-

tection to the plant and its environs in emergency situations.' Again, it is stated in this Binder, 'The auxiliary military police are supplementing the Army of the United States in a vital task of protecting war material and war production facilities.' It appears certain not only that they were employed at the command of the government but that the services rendered by them were for the benefit of the government and the war effort. Any benefit accruing to respondent from their services was purely incidental to the primary purpose of their employment. Reliance upon payment under such circumstances is to embrace form and to ignore the utilities of the situation." (*Atkins*, R. 354-355.)

(2) and (3) *The Board's finding that the guards are hired by the Respondent and that their discharge is ordinarily initiated by the Respondent.* With respect to these findings, which are inextricably intertwined in the evidence, the Court made the following analysis:

"The Board's finding that the guards 'are hired by the respondent; that their discharge is ordinarily initiated by the respondent' is deceptive and, we think, without substantial support. It is true, as the Board found, that the guards 'are interviewed for employment by the respondent.' This is done by respondent's personnel officer when the applicant is required to fill out an application blank. This service on the part of respondent is also required by the government. At the time the application for employment is made, the applicant is expressly told: 'It will not be effective without the approval of the United States government.' True, after the application form had been executed, it was the custom temporarily to assign the applicant to plant control work. In the meantime, he was required by the government to sign the agreement with it, as heretofore related. This agreement stated: 'The United States is approving the employment * * *.' Also, as heretofore sug-

gested, if he refused to sign this agreement, he never became a member of the military police and his dismissal was required within a reasonable time.

The application and agreement were then transmitted to the military authorities at Cincinnati and such authorities made an investigation as to the capacity, integrity and patriotism of the applicant. Such authorities had the entire responsibility of determining the applicant's fitness, even to the extent of his physical fitness. If he was accepted by the military authorities, the signed agreement with the government was returned to the applicant, together with a Plant Guard Identification Card executed by Captain Wetenhall, District Plant Guard Officer.

This card certifies: '..... has been voluntarily and duly enrolled as an Auxiliary to the Military Police for service with the Army of the United States at ....., and is subject to Military Law for the duration of the War or until the earlier official termination by the War Department of his services as an Auxiliary to the Military Police.' It is pertinent to note that this identification card which constitutes the guard's authority states in no uncertain terms that he has been enrolled 'for service with the Army of the United States at .....;' and, further, that he is subject 'to Military Law for the duration of the War or until the earlier official termination by the War Department.' Certainly this badge of authority contains not the slightest indication that the guard has been employed, hired or can be discharged by respondent.

The applicant is also furnished with the 'Certificate of Enrollment,' also signed by Captain Wetenhall. The phraseology of this certificate is the same as that of the identification card. There appears in

the record one of these certificates in its executed form.[1]

Upon receiving the documents just referred to, the applicant is inducted by taking the oath of allegiance to the United States and the military. This oath includes an obligation to be subject to the Articles of War. Any doubt as to when employment as a member of the military police commences is dispelled by a provision in guard order No. 3, which states: 'Service will begin with the date that the plant guard was inducted * * *.'

Plant Protection Data Binder dated June 7, 1943, provides:

> 'Each plant guard who becomes a member of the Auxiliary Military Police continues as such until he is released by the War Department from his obligations. This will take place when competent military authority has approved of his dismissal or resignation or when he has been discharged without honor.'

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[1] (Court's footnote.)

UNITED STATES OF AMERICA

AUXILIARY MILITARY POLICE
ARMY OF THE UNITED STATES

Certificate of Enrollment

This is to certify that Henry Adams Johnston has been voluntarily and duly enrolled as an Auxiliary to the Military Police with the rank of ....., for service with the Army of the United States at E. C. Atkins & Company, Indianapolis, Indiana, and is subject to Military Law for the duration of the War or until the earlier official termination by the War Department of his services as an Auxiliary to the Military Police.
For the Commanding General, Fifth Service Command:

Dated 29 June 1943.

A. C. RASMUSSEN.

Official:

B. R. WETENHALL,
Plant Guard Officer.

Again, it is provided in this same Binder:

'Basically the militarization of the plant guard forces does not change the existing systems of hiring, compensation, and dismissal except as stated in paragraph 25.'

Paragraph 25 provides:

'A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto. Inasmuch as the guards are under oath to the Army, the plant management may suspend a guard without pay pending approval of his dismissal by the District Plant Guard Officer and pending the termination of the guard's enrollment as a member of the Auxiliary Military Police.'

From what we have shown, we think it is conclusively established that the authority to hire and discharge was solely the prerogative of the military. True, respondent was charged by the government with receiving the application for employment and in making a recommendation. This is the sole support, if it can be characterized as such, found in this record for the Board's finding that respondent was authorized to hire. Nor do we find any support for the Board's finding that 'their discharge is ordinarily initiated by the respondent.' The most which can be inferred is that respondent was permitted to recommend for discharge the same as it was required to recommend for hiring.

In making this analysis of respondent's right to hire and discharge, we must note the testimony of the witness Gann, which the Board stresses. It follows:

'Q. Who hires the guard?

'A. The personnel manager and the Chief.

'Q. Who has the authority to discharge you?

'A. The personnel manager or the Chief, I would think, of E. C. Atkins and Co.'

These answers by the witness merely represented his opinion and, in addition, the 'Chief' referred to was Chief Johnston who, as will be shown, was entirely under the control of the military. Putting aside, however, such considerations, a reading of Gann's entire testimony shows conclusively that he was employed in the same manner as all other guards. This is illustrated by the following questions and answers:

> 'Q. From the 21st of January to the 27th of January you were an employee of E. C. Atkins and Company?
>
> 'A. Yes, sir.
>
> 'Q. They pay you whether you are their employee or whether you are a military policeman, but from January 27 you became a military policeman and were no longer an employee of E. C. Atkins and Company, as you had been up to January 27? Your status changed, did it not?
>
> 'A. That's right. I wasn't a member of the Auxiliary Military Police until I was inducted January 27.'

The most favorable possible inference which can be drawn from the record is that respondent's authority, if it had any, with reference to hire and discharge was narrowly limited; in fact, as we have stated, we think it had no right in such matters except that of making recommendations to the military authorities." (*Atkins*, R. 355-358.)

4. *The Board's finding as to the control exercised by Respondent.* Here the Court recognized the vagueness of the Board's finding, which was simply that Respondent "retains a sufficient residual measure of control," and found this unsupported by evidence of any control whatever:

> "This brings us to the matter of control. The Board's finding in this respect may be properly characterized as wholly impotent. It admitted that 'respondent may have surrendered to the military authorities many of the attributes of control which it would normally pos-

sess over its plant guards.' It found, however, that it retained 'a sufficient residual measure of control.' What was intended by this language is not explained. The findings are silent as to any act or conduct on the part of respondent which evidences any control. The oral testimony shows without any contradiction that all members of the plant guard at the Main Plant took their orders and instructions from Chief Johnston. (We assume that the members of the force at the Ordnance Plant likewise took their instructions from Chief Hann; at any rate, no question is raised but that the same situation existed at each plant.) The record shows with the same degree of certainty that Johnston took his instruction *in toto* from the military authorities. The only reference made by the Board in this respect was that Johnston 'works very closely and cooperates with respondent's representatives.' We should think that the exercise of ordinary common sense would require cooperation between the military and the management, but that fact certainly can form no basis for an inference that respondent exercised control. Especially is this so when the direct uncontradicted evidence is that all control was exercised by the Army. In this connection, it seems appropriate to relate certain portions of Johnston's testimony and we do so in a footnote.[1]

---

[1] (Court's footnote.)

'Q. Do you take any orders from Mr. Wood who sits here in the court room and is the personnel director of E. C. Atkins and Company?

'A. Yes; naturally, I work very closely with Mr. Wood, as he is personnel director of the plant and there can be much more efficient guarding of the plant and operation of the plant if we do work closely. I have never taken an order as such from him.

'Q. You try to cooperate?

'A. I try to cooperate to the best of my ability and he does the same for me.'

• • • • •

'Q. Now, how do you receive the general orders for your duties, from what source?

'A. General orders are received from Captain Wetenhall of the Fifth Service Command, Cincinnati.'

• • • • •

The witness Gann, who testified that he was acquainted with all the duties of a guard, did not mention a single instance in which any duty was performed under the direction of respondent. On the other hand, he conceded that all duties were performed under orders received from the military. True at one place in his testimony he was asked, 'What, in general, do guards do?' and answered, 'In general they guard the plant, supposed to obey all the general orders and specific orders which the company asks us to obey.' Later he testified, in complete harmony with the other witnesses, that by general orders he meant those issued by the government pertaining to the service generally, and by special orders he meant those issued by the government which applied especially to respondent's plant. Then he was asked, 'And when you said "company orders" you did not mean the E. C. Atkins Company, but the military company to which you belong? They are the lieutenants, the assistant chief, the chief, and then Lt. Scanlon and Capt. Wetenhall?' And he answered, 'Well, that's true.'

'Q. (Referring to violation of military orders.) To whom do you report such violations?

'A. I would report any violation, any serious violation, to Captain Wetenhall of Cincinnati.

'Q. And who instructs you to enforce orders?

'A. It would be the government.'

* * * * *

'Q. Do any of the Military Police under your command take any orders from any officer, director, or agent of the Atkins company as such?

'A. No; they wouldn't take any orders. Just like myself, they would cooperate in any way they could, but they would only—

'Q. Suppose such cooperation involved deviation from such specific order which you had to give. Would they follow your specific order or would they cooperate?

'A. They would—that would be their orders—to follow mine; yes, sir.

'Q. You would have the same reaction towards such request of cooperation as you would if you had a specific order or a general order to the contrary from one of these superiors, is that right?

'A. Yes, sir. In those orders, it says, "No conflicting interest." It means a little different thing there, but it means a lot besides. You would follow your Government orders first. They would have a much higher priority.'

That the military had control even to the minutest detail is shown by the testimony of Gann that special orders were received from the military as to the particular gate through which certain trucks should enter the plant. Also illustrative of this absolute control is the testimony of Johnston. In response to a question as to what he would do if he found Mr. Wood tampering with machinery or personnel, he answered:

'Well, in a case like that, I would just turn him in, like anybody else. I would arrest him and turn him in because I am sworn to do that. I have sworn an oath.

'Q. Would you do the same with the president of the company?

'A. Yes, sir; I would.

'Q. And you own no responsibility to the president or any director of the company which would make you violate your oath to the Military?

'A. No, sir; there is no reason for that.'

Johnston also identified three forms of passes which were issued to various employees, one for admission from the outside into the armor plate division, another for admission into the same division by an employee entering from another department, and another known as a gate pass, which permitted the entering and departure from a gate. No employee could enter a gate or a building until he had exhibited to a member of the guard the appropriate pass. Even an executive of the company could not enter a gate or go from one building to another without exhibiting his pass to a guard. These were military orders.

The statement in the Board's findings that respondent's personnel director 'referred to the guards at the plants involved as respondent's employees' is also without substance. It is based solely upon the following questions and answers:

'Q. How many of your employees at the main plant are plant guards or Auxiliary Military Police?

'A. Thirty-two.

'Q. When you say your employees, they are your employees only in the sense that you pay their wages, is that right?

'A. That is correct.

'Q. And you make the necessary pay roll deductions?

'A. That's right!'" (*Atkins*, R. 358-360.)

Having thus carefully and painstakingly examined the evidence for support for the Board's findings, the Court concluded that there was none:

"We think the conclusion is inescapable that the Board's findings based upon proof as to what actually happened is without substantial support. The proof shows without contradiction that respondent (1) paid the guards, but under the circumstances heretofore related, (2) had nothing to do with hiring and discharging other than making recommendations as to the former, and (3) exercised no control." (*Atkins*, R. 360.)

The Court then, to be sure that it had not omitted any evidence which might support the findings, went back over the record, examining again those points at which the Board, in its argument and brief to that Court, had claimed to detect support for its findings. Again, it found none. (*Atkins*, R. 360-364.)

In so doing, the Court pointed to the fact that the support the Board purported to have for its findings lay almost entirely in documents, and that in them the Board claimed authority was given to Respondent even if Respondent never exercised it:

"True, the Board intimates that respondent failed to exercise the authority which it had, and stresses certain provisions in the documentary evidence which perhaps lend some color to the suggestion." (*Atkins*, R. 360.)

> "The Board places strong reliance upon certain provisions contained in Circular No. 15 of the War Department, dated March 17, 1943. This document occupies twenty full pages of the Board's brief. A cursory reading of certain statements contained in this document seem to indicate that respondent had some measure of authority over members of the plant guard. Even if this be so, however, as we have heretofore shown, all authority and control was taken over by the Army and none was exercised by respondent. Furthermore, we are of the view that this document when considered as a whole, and especially when considered in connection with other documents to which we have referred, leaves little room for the contention that respondent had the right but failed to exercise control." (*Atkins*, R. 362.)

Although the Circuit Court of Appeals took judicial notice[12] of Circular No. 15 (Board's Brief, Appendix B) which was never part of the record, the Court saw that it did not shed light upon those facts which the Board found in its decision.

3. Circular No. 15 Was Not Available to Support the Board's Finding.

It is submitted that this Circular No. 15 is not available, as support for the Board's findings, to make them conclusive within the provision in Section 10(e) of the Act that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive." That would violate the requirement in Section 10(e) of the Act that the Board's findings must be made "upon all the testimony taken."

This is not to argue for a narrow construction of the words "evidence" and "testimony." Obviously they in-

[12] Respondent contended, and still contends, that this Circular No. 15, which was neither published in the Federal Register nor signed by the Secretary of War, was not such a document of which the Court could take judicial notice.

clude documents as well as oral statements of witnesses; obviously also they include those facts of which a tribunal can take judicial notice.

But the minimum requirement is that the Board's findings be supported by evidence (in its broad sense) *known to the Board*. It is submitted also that while the proceeding is before the Board, the evidence upon which its findings are to be based must be made known to Respondent in order that Respondent may have an opportunity to present rebutting testimony, and to argue the effect and significance of such Board evidence.

In the present case, not even the minimum requirement was met. Circular No. 15 never became, and still is not, part of the record. It was not mentioned at any stage of the proceedings before the Board. It is not cited in the Board's Decision and Direction of Election (*Atkins*, R. 5-8), in the Trial Examiner's Intermediate Report (*Atkins*, R. 33-42), or in the Board's Decision and Order. (*Atkins*, R. 30-33.) It was not mentioned in the oral argument before two members of the Board. (*Atkins*, R. 324-336.) It appeared first as an "Addendum" at pages 20-44 of the Board's Brief in the Circuit Court of Appeals.

It is apparent from these circumstances that this Circular No. 15 was not known to Respondent, the Union, the Auxiliary Military Police, or the Board until the Board was preparing its case for the Circuit Court of Appeals. It could not have been part of the evidence upon which the Board made its finding, because it was not then known to the Board. It therefore cannot be cited as evidence supporting the finding of the Board and making it conclusive.

The Senate Committee on Education and Labor stated that the judicial review provided in the Act was to provide "a complete guarantee against arbitrary action by

the Board."[13] This Court quoted that statement as showing the purpose which the Circuit Court of Appeals was to perform in *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376. Findings of fact which are arrived at by the Board without support in the evidence are arbitrary. The making of such findings is equally an arbitrary action by the Board if they could be supported by judicially noticeable evidence which comes later to the Board's attention.

The power of the Board to make conclusive findings of fact is one necessary to the administrative process. It is also one which by misuse could become an instrument of arbitrary and despotic action. Such misuse is present when the Board makes findings without support in the record. The misuse cannot be eliminated by any search the Board may subsequently make for judicially noticeable evidence outside the record.

The Circuit Court of Appeals should not have considered Circular No. 15 in looking for support for the Board's findings. It did consider that Circular, and discovered that the findings were not supported even there.

4. The Circuit Court of Appeals Erred in Taking Judicial Notice of Circular No. 15.

As has been said, Circular No. 15, issued by Headquarters, Army Service Forces, War Department, Washington, and dated March 17, 1943 (Board's Brief, Appendix B) is not contained anywhere in the record and appeared in these proceedings for the first time in an "Addendum" to the Board's Brief in the Circuit Court of Appeals. Respondent contended that it could not be considered in looking for evidence to support the Board's order because it was not part of the record. The Circuit Court of

[13] S. Rep. No. 573, 74th Cong. 1st. Sess. p. 14.

Appeals rejected this contention and took judicial notice of this Circular No. 15. The Circuit Court of Appeals said:

> "Circular No. 15 has been printed by the Board as a supplement to its brief. It was not introduced in evidence, and respondent contends that it cannot be considered as proof in support of the Board's order. It is a public document of which, so we think, a court may take judicial notice. *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 483." (*Atkins*, R. 353, Footnote.)

It is submitted that the Court could not take judicial notice of Circular No. 15 and that therefore it could not be considered in determining whether the Board's findings of fact were supported by evidence.

This question was argued by counsel for the Board and for Respondent in Motions and Memoranda filed with the Circuit Court of Appeals before the case was briefed, as well as in the briefs before that Court. The Board stated its position as follows:

> "It is well settled that such regulations, like regulations of executive officers of the Government issued in the exercise of their statutory functions, have the force and effect of law. *United States* v. *Grimaud*, 220 U. S. 506, 520-523; *United States* v. *Morehead*, 243 U. S. 607, 613-616; *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349; *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 488. Having such effect, the regulations in question, even though not formally introduced into evidence, may be judicially noticed by this Court just as decisions of the courts and administrative agencies and acts of Congress are judicially noticed and considered. *Caha* v. *United States*, 152 U. S. 211, 221-222; *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 488; *Givens* v. *Zerbst*, 255 U. S. 11, 18." (*Atkins*, R. 342.)

In this the Board states the rule of judicial notice too broadly. The six cases cited by the Board are all cases

in which a statute expressly directed the head of an Executive Department, or Administrative Department, such as the Secretary of War, personally, or the Interstate Commerce Commission, to promulgate rules and regulations in the first instance, or to approve them as promulgated after they have been prepared by a subordinate officer or bureau. In not one of the cases is a regulation, not promulgated under the hand of the head of the Executive Department, or by order of the Administrative Tribunal concerned, given statutory effect or judicially noticed.

Later the Board added the further citation of *Standard Oil Co. of California* v. *Johnson*, 316 U. S. 481, 483-484. This case, however, was of the same kind. It did hold that certain War Department regulations had the force of law, but they were regulations promulgated by the Secretary of War, himself, under a Congressional enactment authorizing him to do so. This appears from that case as follows: "On July 25, 1895, the Secretary of War, under authority of Congressional enactments promulgated regulations providing for the establishment of post exchanges." (316 U. S. 483-484.)

Circular No. 15 was signed by the Chief of Staff of the General Staff Corps, who recited that it was done by command of Lieutenant General Somervell, who was then Head of Army Service Forces. Circular No. 15 was not issued by the Secretary of War. There is no statute or executive order authorizing the Chief of Staff of the General Staff Corps, or for that matter the Head of Army Service Forces, to issue any such regulations. On the contrary in Executive Order No. 8972, dated December 12, 1941, the President said: "I hereby authorize and direct the *Secretary of War*, whenever he deems such action to be necessary or desirable, * * * to establish and maintain military guards and patrols * * *." (Emphasis supplied. *Atkins*, R. 345.)

Thus the rule is that regulations have the force of law, and are to be judicially noticed, only if they are issued by the officer of the Government expressly authorized to issue them by statute or Executive Order. The multitude of directives, opinions and rules which are put out by subordinates in the Government do not have such effect.

It would be grossly unfair to give such directives the force of law and to take judicial notice of them since the persons affected by them do not have an opportunity to learn of their existence or their content. These are not regulations which have been published in the Federal Register. Apparently they do not come within the provision of the Federal Register Act (49 Stat. 501, 44 U. S. C. 305), requiring publication of "such documents or classes of documents as the President may determine from time to time have general applicability and legal effect."

It is submitted that the Circuit Court of Appeals could not properly take judicial notice of Circular No. 15 issued by Army Service Forces and that Circular No. 15 cannot be used in a search for evidence to support the Board's findings of fact.

VI.

The Order of the Board Is Too Broad in Its Scope.

Even if it were held that the Auxiliary Military Police were employees of Respondent within the meaning of the Act, the order of the Board (*Atkins*, R. 32-33) should not be enforced because it is too broad in its scope.

In the first place, the order requires Respondent to bargain collectively with the Union as the representative of the plant guards "in respect to rates of pay, wages, hours of employment, and other conditions of employ-

ment." Even the Board in its final findings in its Decision and Order (*Atkins*, R. 32) has conceded that Respondent surrendered to the Army many of the attributes of control over the plant guards; and therefore many normal subjects of collective bargaining would be beyond the bargaining power of Respondent. The analysis contained in Part II of this Brief, even if not accepted in every particular, surely demonstrates that as to some subjects Respondent could not possibly have bargained.

It is therefore submitted that both the order to cease and desist and the order to take affirmative action to bargain "in respect to rates of pay, wages, hours of employment, and other conditions of employment" are far too broad to be enforced. The Board has given no indication as to which items of collective bargaining, as set forth in the Union's proposed contract (Board's Ex. 102, *Atkins*, R. 297-304), are within the "residual measure of control over the terms and conditions of employment of the guards." Obviously the order could not be enforced as written and the Board's request for its enforcement should be completely denied.

In the second place, paragraph 1(b) of the order requires Respondent to cease and desist from

> "Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act." (*Atkins*, R. 32.)

This language is not limited to plant guards, but is, in its terms, broad enough to refer to any employees of Respondent. It is plain in the record that Respondent's re-

lations with its productions employees have been uniformly harmonious. Respondent has bargained collectively with Sawsmiths Local Union No. 18,548, AFL, for forty years, and has a closed shop contract with that union. Respondent had, at the time of the hearing, already bargained with the United Steelworkers of America, C.I.O., with respect to the rest of its production employees, for seven years, and had a union shop contract with that union. Respondent had never been the subject of a charge of an unfair labor practice at the instance of either.

There is no suggestion in the record that Respondent has been guilty of any act or conduct which might be construed to be an unfair labor practice other than the simple refusal to bargain with the Union as the representative of the employees. From the beginning Respondent made it clear that this refusal was based solely upon Respondent's belief that these Auxiliary Military Police were not its "employees." (Board's Ex. 103, *Atkins*, R. 304-305.)

It is clear from these facts that if the Auxiliary Military Police were held to be Respondent's employees, and an order were entered, it should not apply to the production employees with whose unions the Respondent has dealt so long and so harmoniously. It is submitted further that the order should do no more than to require bargaining, and that there is no occasion for paragraph 1(b) of the proposed order at all.

This is in accordance with the principles laid down by this Court in *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426, at 436-437:

> "It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. But we think that without sacrifice of that principle, the National Labor Relations Act does not contemplate that an employer who has unlawfully refused to bargain with his employees shall for the

indefinite future, conduct his labor relations at the peril of a summons for contempt on the Board's allegation, for example, that he has discriminated against a labor union in the discharge of an employee, or because his supervisory employees have advised other employees not to join a union. See *e.g., H. J. Heinz Co.* v. *National Labor Relations Bd., No. 73,* decided January 6, 1941.

Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts. But as the Court has held in the case of the Federal Trade Commission, see *Federal Trade Commission* v. *Beech-Nut Packing Co., supra* (257 U. S. 455, 66 L. ed. 314, 42 S. Ct. 150, 19 ALR 882), an order not so related should be appropriately restricted on review. The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past. See *United States* v. *Trans-Missouri Freight Asso.*, 166 U. S. 290, 308, 309, 41 L. ed. 1007, 1016, 1017, 17 S. Ct. 540; *Standard Oil Co.* v. *United States*, 221 U. S. 77, 55 L. ed. 619, 652, 31 S. Ct. 502, 34 LRA (NS) 834, Ann. Cas. 1912D 734; *Texas & N.O.R. Co.* v. *Brotherhood of R. & S.S. Clerks*, 281 U. S. 548, 74 L. ed. 1034, 50 S. Ct. 427; *Local 167, I.B.T.* v. *United States*, 291 U. S. 293, 78 L. ed. 804, 54 S. Ct. 396; *Virginian R. Co.* v. *System Federation*, R.E.D. 300 U. S. 515, 541, 543, 544, 81 L. ed. 789, 796, 797, 798, 57 S. Ct. 592. We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed

or that danger of their commission in the future is to be anticipated from the course of his conduct in the past. That justification is lacking here." (312 U. S. 436-437.)

VII.

Enforcement of the Board's Order Was Properly Denied as Inimical to the Public Welfare.

If it were held, contrary to the principal holding of the Circuit Court of Appeals, that the Auxiliary Military Police were "employees" within the meaning of the Act, nevertheless the Board's Order should be denied enforcement because it conflicted with the prosecution of the War, a National objective more important than those set forth in the National Labor Relations Act. The situation presented is similar to that presented in *Southern Steamship Company* v. *National Labor Relations Board*, 316 U. S. 31, where this Court said:

> "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." (316 U. S. 31 at 47.)

It has already been demonstrated herein that the Army retained control over the subjects which are ordinarily covered by collective bargaining. The Army did so as a necessary step in the prosecution of the war. In Executive Order 8972, dated December 12, 1941, in which the President directed the Secretary of War "to establish and

maintain military guards," the President stated that he acted by virtue of the authority vested in him as Commander-in-Chief. (*Atkins*, R. 344-345.)

It is to be assumed that the Army's retention of control over the terms and condition of employment was deemed by the Army necessary to the performance of the mission of these Auxiliary Military Police. In view of the fact that the Army enrolled these guards "to serve with the Army" for "protection from air raid; Fifth Column activity; paratroop attack or invasion" (Resp. Ex. 4, *Atkins*, R. 106) and required them to wear insignia so that "members serving with the Army will be recognized as legitimate troops" (Resp. Ex. 4, *Atkins*, R. 110), it is not surprising that the Army would not want their hiring, discharge, promotion, hours, shifts, discipline, and other terms and conditions of employment out of Army control.

The Board's order would have required that that control be taken from the Army and that those terms and conditions be determined rather by Respondent and the Union.

The Board sought the removal of imagined obstructions to interstate commerce so single-mindedly that it placed obstructions in the path of the prosecution of the War. The Circuit Court of Appeals rightly refused to assist it.

Conclusion.

For the foregoing reasons it is submitted that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 418

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

JONES & LAUGHLIN STEEL CORPORATION,
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BRIEF AMICUS CURIAE FOR PACKARD MOTOR CAR COMPANY

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SUBJECT INDEX

	Page
Official Reports of Lower Court Opinions	2
Statement of Case	3
Question to be Discussed	7
Summary of Argument	7
Argument	8
The Plant Guards in Question Are Public Peace Officers	8
As Public Peace Officers the Plant Guards Are Not Permitted to Assume an Incompatible Obligation	10
The Obligation of the Plant Guards to Their Union Is Incompatible With Their Obligation to the Public	12
It Is Against Public Policy to Permit Public Peace Officers to Assume Incompatible Obligations	17
Public Policy Expressed in Federal Statutes	18
Public Policy Expressed in Laws, Ordinances and Regulations of Other Jurisdictions	21
Public Policy as Expressed in Judicial Decisions	24
Public Policy as Expressed in Statements of Public Officials	27
It Would Be Against Public Policy to Enforce the Board's Order in This Case	32
Appendix: Ohio Constitutional and Statutory Provisions Relating to Duties and Responsibilities of Deputy Sheriffs	36

TABLE OF AUTHORITIES

42 Amer. Jur. 935	10
42 Amer. Jur. 936	10
Anderson vs. Mt. Clemens Pottery Co., —— U. S. ——, 66 S. Ct. 1187	32
Bowron, Fletcher	29
Brownell vs. Russell, 76 Vt. 326, 57 A. 103	33
Carter vs. Thompson, 165 Va. 312, 180 S. E. 410	11
Catlin, Warren B., "The Labor Problem in the United States and Great Britain"	23
Church of the Holy Trinity vs. United States, 143 U. S. 457	35

Page
City of Jackson vs. McLeod, —— Miss. ——, 24 So. (2d) 319 12
Cleveland vs. Luttner, 92 Ohio St. 492, 111 N. E. 280..10, 20
Coane vs. Geary, 298 Ill. App. 199, 18 N. E. (2d) 719... 33
Coolidge, Calvin 27
Departments of State, Justice, Commerce, and the Judiciary Appropriation Act, 1947, Public Law 490, Title V, Sec. 501..... 19
DeRomedis et al. vs. Yorkville, 21 O. N. P. (N.S.) 340.. 7
District of Columbia Appropriations Act, 1947, Public Law 493, Sec. 3..... 19
District of Columbia Code (1940), Sec. 4-125, 41 Stat. 364 (1919) 20
District of Columbia Code (1940), Sec. 4-407; 41 Stat. 398 as amended by Act of July 31, 1939, 53 Stat. 1143. 20
First Supplemental Appropriation Act, 1947, Public Law 665, Title III, Sec. 301..... 19
Fraternal Order of Police vs. Harris, 306 Mich. 68, 10 N. W. (2d) 310.....11, 25, 26, 34
Government Corporations Appropriations Act, 1947, Public Law 519, Sec. 305..... 19
Hagerman vs. Dayton, 147 Ohio St, 313..... 24
Halsbury's Laws of England, Second Edition, Vol. 25, p. 343 23
Hodes, Barnet 28
Kintz vs. Harriger, 99 Ohio St. 240, 124 N. E. 168..... 17
Labor-Federal Security Appropriations Act, 1947, Public Law 549, Title VII, Sec. 701..... 19
LaGuardia, F. H..... 28
Lloyd-LaFollette Act, 5 U. S. C. 652..... 20
McAuliffe vs. Mayor, 155 Mass. 216, 29 N. E. 517..... 33
McNatt vs. Lawther, 223 S. W. 503 (Tex. Civ. App., 1920). 26
Mitchell vs. Industrial Commission of Ohio, 57 O. App. 319, 13 N. E. (2d) 736.....9, 20
Murphy, Frank 28
National Labor Relations Act, Section 2, paragraph 2.. 19
N. L. R. B. vs. E. C. Atkins & Co., 147 F. (2d) 730... 35
N. L. R. B. vs. Jones & Laughlin Steel Corporation, 146 F. (2d) 718..... 14

Page
N. L. R. B. vs. Jones & Laughlin Steel Corporation, 154 F. (2d) 932 12
Naval Service Appropriation Act, 1947, Public Law 492, Sec. 109 19
New York, Chicago & St. Louis R. R. Co. vs. Fieback, 87 Ohio St. 254, 100 N. E. 889 ..... 9, 20
New York Times, July 14, 1939, page 4, column 2 28
Ohio Constitution, Article XV, Section 7 36
Ohio General Code Section 2 36
Ohio General Code Section 3 36
Ohio General Code Section 9 37
Ohio General Code Section 2830 37
Ohio General Code Section 2831 37
Ohio General Code Section 2833 37
Ohio General Code Section 2834 38
Ohio General Code Section 4375 9
Ohio General Code Section 4666 6
Ohio General Code Section 12819 38
Ohio General Code Section 13432-1 39
Ohio General Code Section 13432-3 39
Ohio General Code Section 13432-9 39
Ohio General Code Section 13432-24 39
Pennsylvania R. R. Co. vs. Deal, 116 Ohio St. 408, 156 N. E. 502 ..... 10, 20
Railway Mail Association vs. Corsi, 326 U. S. 88 24
Rhyne, Charles S., "Labor Unions and Municipal Employe Law" 21, 27, 28, 29, 30
Roosevelt, Franklin D. 27
Schoonmaker, George N. 31
Southern Steamship Co. vs. N. L. R. B., 316 U. S. 31 35
Spicer Manufacturing Corporation, N. L. R. B. Case No. 8-C-1399 (C-2628) 16
State ex rel. vs. Price, 101 Ohio St. 50, 128 N. E. 173 20
Third Deficiency Appropriation Act, 1946, Public Law 521, Title IV, Sec. 401 19
Toledo Blade, October 7, 1946, page 15, column 8 31
Treasury and Post Office Departments Appropriations Act, 1947, Public Law 518, Title III, Sec. 501 19
Wardell vs. Railroad Co., 103 U. S. 651 17
Wilson, Woodrow 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 418

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

JONES & LAUGHLIN STEEL CORPORATION,

Respondent.

BRIEF AMICUS CURIAE FOR PACKARD MOTOR CAR COMPANY

Having first obtained the written consent of all parties (filed herewith) as required by Section 9 of Rule 27, the Packard Motor Car Company, by Arnold F. Bunge, its attorney, files this brief as amicus curiae.

On September 30, 1946, in Case No. 8-C-1865, entitled, *In the Matter of Packard Motor Car Company and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 12 (CIO)*, 71 N. L. R. B. No. 13, the National Labor Relations Board issued its decision and order finding the Packard Motor Car

Company guilty of an unfair labor practice for refusing to bargain with a union claiming to represent its plant protection employees under circumstances similar to those in the case at bar. In that case the trial examiner, in his intermediate report, specifically found that his decision and recommendations were contrary to the decision of the Sixth Circuit Court of Appeals in the present case but refused to follow the Court decision because the Board had not acquiesced therein.

By reason of the foregoing, Packard Motor Car Company has an interest in the questions of law involved in this case and, therefore, requested the parties for their written consent to the filing of this brief.

Official Reports of Lower Court Opinions

On May 3, 1943, the National Labor Relations Board issued its decision and direction of election, in Case No. R-1543, directing that an election be held at the Jones & Laughlin Steel Corporation, Otis Works, Cleveland, Ohio, among all patrolmen, watchmen, and firemen, including dump laborers, with certain exclusions.

The various Board and Court proceedings in this case are officially reported as follows:

49 N. L. R. B. 390 (1943) Board decision and direction of election;

53 N. L. R. B. 1046 (1943) Board decision and order in unfair labor practice case;

146 F. (2d) 718 (C. C. A. 6, 1944) Court judgment denying enforcement of Board order;

325 U. S. 838 (1945) Court order granting certiorari, vacating judgment and remanding case for further consideration of alleged changed circumstances;

326 U. S. 804 (1945) Rehearing denied;
154 F. (2d) 932 (C. C. A. 6, 1946) Court judgment again denying enforcement of Board order.

On December 23, 1946 on petition of the National Labor Relations Board this Court granted certiorari. —— U. S. ——; 67 S. Ct. 479.

Statement of Case

This case is a proceeding brought here by the petition of the National Labor Relations Board seeking review of a judgment of the Sixth Circuit Court of Appeals denying the petition of the Board for enforcement of an order directing Jones & Laughlin Steel Corporation to bargain with United Steel Workers of America (CIO) as the exclusive representative of all patrolmen, watchmen, and firemen, including dump laborers, employed by it at its Otis Works, but excluding lieutenants, captains and supervisors.

The record shows that at the time of the original hearing the Jones & Laughlin Steel Corporation was engaged in war production (R. 4) and employed a plant protection force consisting of a captain, (R. 4, 10) eight police lieutenants, (R. 4, 10) fifty-eight patrolmen (R. 4, 8), two fire captains (R. 4, 10), two firemen (R. 4, 9) and two dump laborers (R. 4, 9) who also perform plant protection duties.

At the time of the hearing before the Board, the plant protection force were all armed and uniformed members of the United States Army Auxiliary Military Police (R. 6) under the direct supervision and jurisdiction of the United States Army and receiving instructions from United States Army Officers. (R. 6, 7). As such Military Police they were each required to and did take an oath to support and defend and bear true faith and allegiance to the Consti-

tution of the United States and to perform their duties as civilian auxiliaries to the military police to protect war material, war premises, and war utilities against all enemies and to obey any orders issued in connection therewith by the President, as Commander in Chief of the Army and Navy of the United States, and by his duly authorized officers. (R. 7). They were subject to the Articles of War and to military law. (R. 7, 11).

Their duties as Military Police were to guard and protect war material, war premises and war utilities from injury or destruction, including the making of arrests, as peace officers, for violations of Federal laws, as well as for violation of orders and regulations issued by military authority. (R. 7). They were charged with the responsibility for the protection of the physical plant and equipment of the Corporation. It was their duty to keep intruders out, to see that the rules and regulations of the Corporation were enforced for the benefit of all concerned and to see that the peace was kept. Their duties were similar to those of a city, county or state police force. (R. 6).

The same union which was certified by the Board for the plant protection force also was the recognized collective bargaining representative for the production and maintenance workers in the same plant and had an agreement with the Corporation covering those workers. (R. 16-33). That contract contained the usual wartime maintenance of membership and union dues check-off clauses. (R. 17).

After the case was remanded by this Court (325 U. S. 838) with instructions to the Circuit Court of Appeals to give consideration to the changed circumstances with respect to the demilitarization of the plant protection force, the parties entered into a stipulation of the facts of said changed circumstances. (R. 114-118).

The stipulation indicated that the plant protection force was demilitarized shortly after May 29, 1944 (R. 114)

but that the police captain was a Deputy Sheriff of Cuyahoga County, Ohio and that all of the other members of the force were commissioned, sworn and bonded as private policemen of the City of Cleveland, Ohio under Section 188 of the Cleveland Municipal Code of 1924, and as such are members of the municipal police force and have and exercise the legal powers of peace officers in their work as plant guards. (R. 115).

It was further stipulated that when on duty, all members of the guard force are required to wear police badges, and uniforms of a military style and are armed with police revolvers and clubs or batons, and when occasion requires, with other arms and police equipment. (R. 115).

Like other peace officers, their principle functions are the protection of the property of the Corporation and its employees from damage, injury, theft or trespass; to maintain peace and good order by demanding and enforcing obedience to the safety and other rules of the Corporation as well as all applicable public laws and ordinances and by preventing and arresting any violation thereof, or any breach of peace in or near the works; to detect and, if possible, prevent crime; to investigate and report, in confidence to their superiors, all crimes, suspected crimes, irregularities and casualties occurring in the works; and to assist in the criminal prosecution of any person who may lawfully be charged with committing or attempting to commit any such crime. (R. 115, 116).

During the calendar year 1945, the guard force actually performed those duties by making numerous arrests for and investigations of crimes, by helping at fires and by apprehending employees found violating Corporation rules and escorting employees from the plant. (R. 116, 117).

For many years the police protection by the regular city police force has not been practical or feasible and the police protection of the works and the enforcement of law,

peace and good order therein has been left wholly to the plant protection force. The work of preventing and extinguishing fires has also been largely left to the guard force. (R. 116).

The guard force performed all of these duties before, during and after their period of militarization. In addition, during their period of militarizaton, they were requred to inform themselves of the contents of various communications published or circulated by authority of the army and their drills were conformed to standards established by the army. (R. 117).

From the foregoing it will be seen that during the entire period involved in this proceeding, the persons in question were police peace officers owing a public duty to the State of Ohio and that for a portion of the time involved they were members of the Armed Forces charged with all of the responsibilities of such employment.

As members of the union, the plant protection employees were required to take the usual oath administered to union candidates and in which they pledged themselves as follows:

> "I do sincerely promise * * * to abide by the laws of this Union; to bear true allegiance to, and keep inviolate the principles of the United Steelworker of America * * * to defend on all occasions and to the extent of my ability the members of our organization. That * * * as the steel workers of the entire country are competitors in the labor world, I promise to cease work at any time I am called upon by the organization to do so. * * *"

Ohio General Code Section 4666 provides in part:

> Each officer of the corporation, or of any department * * * thereof, whether elected or appointed as a substitute for a regular officer * * * before entering upon his official duties shall take an oath to support the constitution of the United States and the

> Constitution of Ohio, and an oath that he will faithfully, honestly and impartially discharge the duties of the office. • • •

In the case of *DeRomedis et al vs. Yorkville*, 21 O. N. P. (N. S.) 340 (Jefferson Co. Ct. of Com. Pleas, 1918) it was held that a police officer was an officer within the meaning of the foregoing statute. On page 343 the Court said:

> It is uniformly held that a policeman is not only a municipal officer but a state officer as well.

It is difficult to see, how in time of a strike, a plant guard could be loyal to both his oath as a union member and his oath as a state officer.

Question To Be Discussed

The record presents the following question for discussion:

Should this Court order the enforcement of an order of the National Labor Relations Board requiring the Jones & Laughlin Steel Corporation to recognize and bargain with a union as the collective bargaining representative of its plant guards who during all of the time involved were public peace officers of the State of Ohio and who, during some of the time were also Military Police, when such union is already the collective bargaining representative of the production workers in the same plant and membership in the union carries with it the obligation to strike when requested by the Union?

It is contended that the order should not be enforced.

Summary of Argument

Following is a brief summary of the argument as to why the order of the Board should not be enforced:

1. The plant guards are public peace officers and as such owe their undivided allegiance to the

public.

2. As such public peace officers the plant guards may not assume an incompatible obligation.

3. If they are permitted to become members of and represented by the union their obligation to the union will be incompatible with their obligations as public peace officers.

4. It is against public policy as expressed in the statutes, judicial decisions and public statements of public officials, to permit a public peace officer to assume incompatible obligations.

5. It would be against public policy and inimical to the public safety to enforce the Board's order in this case.

Argument

In the following pages of this brief and under appropriate headings we will detail our argument as to why the Board's order should not be enforced.

The Plant Guards in Question Are Public Peace Officers

The record shows that the captain of the guard force is Deputy Sheriff of Cuyahoga County, Ohio, and that all other members of the force of special policemen of the City of Cleveland, Ohio.

The Ohio constitutional and statutory provisions relating to the duties and responsibilities of Deputy Sheriffs will be found in the appendix.

In the case of *Mitchell vs. Industrial Commission of Ohio*, 57 O. App. 319, 13 N. E. (2d) 736 (1936), the first two syllabi are as follows:

> "A sheriff, by virtue of the provisions of Section 2833, General Code, has authority, in case of emergency, to call persons to his aid in the making of an arrest, and a deputy sheriff has like authority.
>
> "A person called upon verbally by a deputy sheriff to assist in making an arrest, by the words 'in the

name of the law, you are a deputy sheriff,' the person to be arrested being known to the deputy as a dangerous character and the sheriff and other deputies not being at hand, is an 'employee' of the county within the meaning of the Workmen's Compensation Act.''

Ohio General Code Section 4375 reads in part as follows:

> "The director of public safety * * * may commission private policemen, who may not be in the classified list of the department, under such rules and regulations as council prescribes."

Acting under authority of this statute and the ordinance of the City of Cleveland the members of the guard force, other than the captain, were appointed private policemen of that city.

In the case of *New York, Chicago & St. Louis R. R. Co. vs. Fieback,* 87 Ohio St. 254, 100 N. E. 889 (1912), the Supreme Court of Ohio said, beginning on page 264:

> "It appears that John Beattie, for whose conduct the defendant in error seeks to recover damages from the plaintiff in error, was so appointed, commissioned and sworn to perform the duties of a policeman for the plaintiff in error, The New York, Chicago & St. Louis Ry. Co., and was at the time of the acts complained of, authorized so to act. So that, although he was appointed at the request of the railroad company and although his salary was paid by it, he was in fact, at the time of the plaintiff's injury, a public officer; and by the express terms of Section 3428, Revised Statutes (General Code, Section 9151), the railroad company would not be liable for his acts if a municipal corporation would not be liable. Police officers, by whomever appointed or elected are generally regarded as public or state officers deriving their authority from the sovereignty, for the purpose of enforcing the observ-

ance of the law; and for their malfeasance, misfeasance or non-feasance in office the city is not responsible."

That case was followed in *Pennsylvania R. R. Co. vs. Deal*, 116 Ohio St. 408, 156 N. E. 502 (1927).

In the case of *Cleveland vs. Luttner*, 92 Ohio St. 492, 111 N. E. 280 (1915), the Supreme Court of Ohio said on page 494:

"A public officer is a public servant, whether he be a policeman of a municipality or the president of the United States."

It seems clear that in Ohio all of the members of the plant protection force are public peace officers charged with a public duty and responsibility as such.

As Public Peace Officers the Plant Guards Are Not Permitted To Assume an Incompatible Obligation

It is a general rule that public officers may not hold more than one office at the same time if such offices are incompatible with each other. 42 *Amer. Jur.* 935.

In 42 *Amer. Jur.* 936 it is stated:

"Incompatibility of offices exists where there is a conflict in the duties of the offices, so that the performance of the duties of the one interferes with the performance of the duties of the other. This is something more than a physical impossibility to discharge the duties of both offices at the same time. They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant so that, because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. It is not an essential ele-

ment of incompatibility of offices at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office is superior to the other in some of its principal or important duties, so that the exercise of such duties may conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible. It is immaterial on the question of incompatibility that the party need not and probably will not undertake to act in both offices at the same time. The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices."

The same principle has been applied to police officers. In the case of *Carter vs. Thompson*, 165 Va. 312, 180 S. E. 410, 412, it is stated:

"Police and fire departments are in a class apart. Both are at times charged with the preservation of public order, and for manifold reasons they owe to the public their undivided allegiance."

In the case of *Hutchinson vs. Magee*, 278 Pa. 119, 122 A. 234, it is stated:

"It is generally conceded that association with an organization which, on any occasion or for any purpose, attempts to control the relations of members of either the police or fire departments toward the municipality they undertake to serve, is, in the very nature of things, inconsistent with the discipline which such employment imperatively requires, and therefore must prove subversive of the public service and detrimental to the general welfare; hence we are unable to say the court below erred in not holding the municipal authorities named as defendants abused their power when they acted on this view."

To the same effect is the case of *Fraternal Order of Police vs. Harris*, 306 Mich. 68, 10 N. W. (2d) 310.

The Obligation of the Plant Guards to Their Union Is Incompatible With Their Obligation to the Public

We have already pointed out the inconsistency between the oath of the plant guard as a Military Policeman and his oath of fidelity to the union. We have also called attention to the inconsistency between their oaths as peace officers and their oaths as union members. Having assumed these obligations, it is difficult to see how they could faithfully perform all of these obligations at the same time.

This incompatibility was pointed out by the Sixth Circuit Court of Appeals in its last opinion, *N. L. R. B. vs. Jones & Laughlin Steel Corp.*, 154 F. (2d) 932 on page 935, where the Court said:

> "In case of industrial unrest and strikes on the part of the production employees, the obligations of the plant guards to the municipality and state would be incompatible with their obligations to the union which, since it represents production employees, authorizes and directs the strike."

In the case of *City of Jackson vs McLeod*, —— Miss. ——, 24 So. (2d) 319 (1946), the Court said on page 321:

> "It ought to be conceded by everybody that while a city policeman must perform his duties with courage and intelligence, he must do so without favoritism. Nothing could be more unbecoming to a police department than that it shall be pledged, or otherwise committed in an obligatory manner, to a preference of one group over another when all are paying their salaries, and particularly is this true when the groups are such that disputes between them are liable to arise, which in turn may lead to disorders. And inasmuch as the City Council is elected by the people and made responsible to the people for the proper conduct of every department of the city government, the police employees must be responsible to the council and must be under its direction, free

from the obligation of any other allegiance whatsoever so far as their activities as policemen are concerned."

The Court then cites and quotes from a number of authorities and on page 322 continues:

"And concurring as we do in the above quoted excerpts taken from the courts on the applicable law, nothing further is necessary than now to quote the pledge which each member of the proposed union must take as a feature of his membership: 'I * * * pledge my honor to observe faithfully the constitution and laws of this local of the American Federation of State, County and Municipal Employees and the rules and regulations for the government thereof; not to make public any of the private proceedings of this local; to perform faithfully all the duties assigned to me; to support the products and services of organized labor by making purchases of such products and services; to so conduct myself at all times as not to bring reproach upon my local; and at all times to bear true and faithful allegiance to the American Federation of State, County, and Municipal Employees and to the labor movement in general.'

"When the terms of this pledge and the other facts mentioned herein, all of which are undisputed, are laid alongside the legal principles above set forth it is manifest, as we now think, that the Civil Service Commission had before it a cause upon which reasonable men, acting as commissioners, could reasonably arrive at the conclusion which they did, and this being the case no court or jury should be permitted, or can be permitted, within constitutional limitations, to otherwise adjudge. Had such a pledge, but to the opposite effect, been made to some group, by whatever name called, favoring non-unionism and that the police would in their activities endeavor at all times to advance the cause of non-

unionism it would have been equally objectionable had the Civil Service Commission so held, as doubtless it would."

In the original opinion in this case, *N. L. R. B. vs. Jones & Laughlin Steel Corporation*, 146 F. (2d) 718, the Sixth Circuit Court of Appeals said, beginning on page 722:

"The Board, under Sec. 9(b) had a positive duty to perform in the interest of the public. It must be kept in mind that in time of national peril, the preservation, protection and promotion of the national welfare is the paramount objective; and the Board must select bargaining agents with this in view. It must anticipate that the Union selected as agent would negotiate through individual members who had a common interest with the employees in securing for themselves advantageous agreements with respect to hours, wages and other conditions of employment. It is manifest that these personal interests of the bargainors, as well as the demands made upon them either by the employees or employers might necessarily constitute a serious and embarrassing handicap when it came to the consideration of the interest of the public. When these particular Unions were selected as bargaining agents for the plant protection employees, these employees might in an effort to discharge their duty to their employer find themselves in conflict with other members of their Union over the enforcement of some rule or regulation they were hired to enforce; or upon the other hand, in conflict with the Federal Government because of fealty to the Union at the time of a dispute involving the public interest. We think that the imposition of such strains upon personal allegiance and personal interest would undoubtedly be detrimental to the public interest and to the free flow of commerce."

To permit plant guards to belong to and be represented by the same union that represents the production workers is to say that they can faithfully serve two masters. Whenever one attempts to serve two masters and a conflict arises between them, he is faced with the necessity of either refusing to serve either of his masters or of making a choice between them.

If the Corporation is compelled to bargain with the union as the representative of the plant guards then the union will control their tenure of employment. The union will make the agreement with the Corporation determining the conditions under which the guard shall work and under which he will be permitted to hold his job. The union, by use of its economic force, may compel the Corporation to enter into a closed shop agreement making union membership a condition of employment. If union membership is a condition of employment, then the union can terminate the employment by simply suspending or expelling the guard from the union. Such suspension or expulsion would not only terminate the guard's employment with his present employer but would also prevent him from procuring employment in any other union shop.[1]

[1] For instance: Section 8 of Article 6 of the Constitution of the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America provides as follows:

"Section 8: Any Local Union expelling any member for cause shall notify the International Secretary-Treasurer and the latter shall notify all Local Unions of this fact forthwith. A Person who has been suspended or expelled by any Local Union shall not be eligible for membership in any other Local Union until all claims or charges against such person have been satisfactorily settled with the Local Union suspending or expelling and written notice to this effect furnished the Local Union to which such person seeks admission."

That the fear of failure to perform their duty because of a conflict of interests is real and not imaginary has been demonstrated by experience in plants where the dual allegiance exists.[2]

This Court should not enforce the Board order which, if enforced, will place the plant guards in a position requiring them to divide their allegiance between two masters and when conflict arises to choose which of them they will serve.

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[2] Mr. Joseph Larkin, Vice President of Bethlehem Steel Corporation, on April 1, 1943, in testifying before the House Military Affairs Committee stated that at one of the company's plants the guards were represented by the same union as the production workers and that when a guard found one of his fellow union members asleep, instead of reporting the member for his misconduct, called up the head of the union for instructions and was told to forget about it which he did. (R. 11.)

In the matter of *Spicer Manufacturing Corporation*, N. L. R. B. Case No. 8-C-1389 (C-2628), on April 20, 1943, Captain Ralph VanVorce, who was in charge of the Auxiliary Military Police at the Spicer plant, testified as follows, beginning on page 1470 of the record:

"Q. Has the fact that the guards are in the same bargaining unit with the production and maintenance workers affected the discipline of the guards in any way so far as you are concerned? A. I think it does.

Q. Has it interfered with your orders in any way? A. Sometimes.

Q. Can you give us any instances? A. I don't know as I can give you the specific instance.

Mr. Johnstone: I move to strike the questions and answers.

Trial Examiner Batten: Well, can you tell us why it has affected?

The Witness: Some guards, you give them an order to perform a certain duty, and they will go to the bargaining committee to see whether they have to do that or not.

Trial Examiner Batten: Does that interfere with your work, because they go and ask whether they will?

The Witness: Well, it has—

Trial Examiner Batten: Have you ever had a guard refuse to do what you told him to do?

The Witness: I don't know as I can recall any offhand.

Trial Examiner Batten: In other words, if you issue an order to a man, you expect it to be obeyed?

The Witness: That is right.

Trial Examiner Batten: Did you ever have a man tell you he wouldn't do it?

The Witness: I have had them tell me they wouldn't do it unless the Union said it was O.K.

Trial Examiner Batten: You mean they refused to do it until they consulted the Union

The Witness: That is right."

It Is Against Public Policy To Permit Public Peace Officers To Assume Incompatible Obligations

In the case of *Wardell vs. Railroad Co.*, 103 U. S. 651 (1880) the Court said the following on page 658:

> "It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as the agent of another whose interests are conflicting. Thus a person cannot be a purchaser of property and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and, 'constituted as humanity is, in the majority of cases duty would be overborne in the struggle.' *Marsh vs. Whitmore*, 21 Wall. 178, 183. The law, therefore, will always condemn the transactions of a party on his own behalf when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted."

In the case of *Kintz vs. Harriger*, 99 Ohio St. 240, 124 N. E. 168, (1919) the Court said beginning on page 246:

> "A correct definition, at once concise and comprehensive, of the words 'public policy' has not yet been formulated by our courts. Indeed, the term is as difficult to define with accuracy as the words 'fraud,' 'equity,' 'welfare.'
>
> In substance, it may be generally said to be the community common sense and common conscience extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow man, that has due regard to all circumstances of each particular situation.
>
> Our written public policies are put into our constitutions, our statutes, and ordinances, but our unwritten public policies rest largely in judicial judgment and public opinion."

We, therefore, look to our statutes, judicial decisions and the public statements of our civic leaders to determine the public policy of the nation. In considering the public policy involved in this proceeding we must remember that the obligation which the plant guards take as union members requires them to "cease work at any time" they are "called upon by the organization to do so."

Public Policy Expressed in Federal Statutes

Recently Congress passed a number of acts appropriating funds for various purposes. Each of those acts contained provisions similar to the following.

> "No part of any appropriation contained in this Act shall be used to pay the salary or wages of any person who engages in a strike against the Government of the United States or who is a member of an organization of Government employees that asserts the right to strike against the Government of the United States, or who advocates, or is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence: *Provided*, That for the purposes hereof an affidavit shall be considered *prima facie* evidence that the person making the affidavit has not contrary to the provisions of this section engaged in a strike against the Government of the United States, is not a member of an organization of Government employees that asserts the right to strike against the Government of the United States, or that such person does not advocate, and is not a member of an organization that advocates, the overthrow of the Government of the United States by force or violence: *Provided further*, That any person who engages in a strike against the Government of the United States or who is a member of an organization of Government employees that asserts the right to strike against the Government of the United States, or who

advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence and accepts employment the salary or wages for which are paid from any appropriation contained in this Act shall be guilty of a felony and, upon conviction, shall be fined not more than $1,000 or imprisoned for not more than one year, or both: *Provided further*, That the above penalty clause shall be in addition to, and not in substitution for, any other provisions of existing law."[3]

The *National Labor Relations Act* in paragraph 2 of Section 2, specifically excludes the states and political subdivisions thereof from the term "employer." That paragraph reads as follows:

"The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

[3] Departments of State, Justice, Commerce, and the Judiciary Appropriation Act, 1947, Public Law 490, Title V, Sec. 501; Public Law 492, An Act making appropriations for the Navy Department and the Naval Service for the fiscal year ending June 30, 1947, and for other purposes, Section 109; Public Law 493, District of Columbia Appropriations Act, 1947, Sec. 3; Public Law 518, Treasury and Post Office Departments Appropriation Act 1947, Title III, Sec. 301; Public Law 519, Government Corporations Appropriations Act, 1947, Sec. 305; Public Law 521, Third Deficiency Appropriation Act, 1946, Title IV, Sec. 401; Public Law 549, Labor-Federal Security Appropriations Act, 1947, Title VII, Sec. 701; Public Law 665, First Supplemental Appropriation Act, 1947, Title III, Sec. 301.

It follows that employees of states or their political subdivisions are not covered by the Act. The counties and cities are political subdivisions of the state. *State ex rel. vs. Price*, 101 Ohio St. 50, 128 N. E. 173. Certainly, while acting in their capacities as Military Police, Deputy Sheriffs, or publicly commissioned Private Policemen, the plant guards are engaged in public functions and are in the public employ.[4] They are, therefore, not within the coverage of the Act.

Federal laws for the District of Columbia prohibit members of the metropolitan police of the distict from affiliating with any organization which holds, claims or uses the strike to enforce its demands, and makes punishable their participation in a strike.[5] Members of the fire department of the District of Columbia are forbidden to directly or indirectly engage in any strike of such department, and their participation is punishable.[6]

The *Lloyd-LaFollette Act*, 5 U. S. C. 652 also limits the right of postal employees to join a union which imposes an obligation to strike. That Act provides in part as follows:

> "Membership in any society, association, club, or other form of organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, against the United States, having for its objects, among other things, improvements in the condition of labor of its members, including hours of labor and compensation therefor and leave of absence, by

[4] *New York, Chicago & St. Louis R. R. Co. vs. Fieback*, 87 Ohio St. 254, 100 N. E. 889 (1912); *Pennsylvania R. R. Co. vs. Deal*, 116 Ohio St. 408, 156 N. E. 502 (1927); *Cleveland vs. Luttner*, 92 Ohio St. 492, 111 N. E. 280 (1915); *Mitchell vs. Industrial Commission of Ohio*, 57 Ohio App. 319, 13 N. E. (2d) 736 (1936).

[5] 41 Stat. 364 (1919); D. C. Code (1940) Sec. 4-125.

[6] Act of Jan. 24, 1920, 41 Stat. 398 as amended by Act of July 31, 1939, 53 Stat. 1143; D. C. Code 1940, Sec. 4-407.

any person or groups of persons in said Postal Service, or the presenting by any such person or groups or (of) persons of any grievance or grievances to the Congress or any Member thereof shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of persons from said service."

In view of the foregoing Congressional expressions of public policy it seems inconceivable that Congress intended that a unit of plant guards, such as we have in this case, should be permitted to join or be represented by a union imposing an obligation to strike and which represents the production workers.

Public Policy Expressed in Laws, Ordinances and Regulations of Other Jurisdictions

An excellent discussion of Constitutional and Statutory Law relating to collective bargaining is found in *"Labor Unions and Municipal Employe Law"* by Charles S. Rhyne (1946), published by National Institute of Municipal Law Officers. Beginning on page 72 he says the following:

"A considerable number of the state have enacted state labor relations acts, as the Federal Government has enacted a National Labor Relations Act, to guarantee and regulate collective bargaining and eliminate unfair labor practices. However, none of the state labor relations acts purport in language to govern public employment and most of them as well as the Federal Act, expressly exclude the state and its political subdivisions as an 'employer' or the applicability of the terms of the act to employes of the state or its political subdivisions. In this connection, the United States Supreme Court held in the *Corsi* case that it was not a denial of equal protection of the laws that the New York labor relations act extended collective bargaining to organizations of private employes but excluded organizations of

public employes. As a consequence, such labor relations statutes with apparent legal propriety do not control government employer-employe relationships. Left open is the question of whether the exclusion of government is in recognition of its inherent exemption from the legislative power to subject the sovereign to collective bargaining with its own employes, or simply an exercise of legislative discretion which can be changed by ordinary amendatory legislation without constitutional amendment."

Beginning on page 73 he calls attention to various state statutes relating to the subject of collective bargaining. Among those listed are statutes of the State of Washington authorizing cities of the first class owning public utilities to bargain wth such employees through their union representatives; Ohio, authorizing the operating officers of a publicly owned utility, which when privately owned, had a contract with a labor union, to continue to contract with the union; Utah, permitting municipal officers to make deductions of union dues from salaries of employees voluntarily authorizing the deduction.

Beginning on page 75 he quotes a resolution adopted by the legislature of Alabama on July 10, 1940 and opposing unionization of state employees.

On page 76 he quotes the following resolution adopted by the Virginia Legislature on February 8, 1946:

"Be it resolved by the Senate of Virginia, the House of Delegates concurring, as follows:

"1. It is contrary to the public policy of Virginia for any State, county, or municipal officer or agent to be vested with or possess any authority to recognize any labor union as a representative of any public officers or employes, or to negotiate with any such union or its agents with respect to any matter relating to them or their employment or service.

"2. Nothing in this resolution shall be construed to prevent employes of the State, its political subdi-

visions, or any governmental agency of any of them from forming organizations, not affiliated with any labor union for the purpose of discussing with the employing agency the conditions of their employment, but not claiming the right to strike."

Beginning on the same page, he quotes a Virginia Statute penalizing public employees who strike.

Beginning on page 79 he discusses legislation enacted by the province of Quebec, Canada, in 1944 giving public employees a limited right to bargain collectively. However, it is significant that the legislation provides that the provincial and muncipal police are prohibited from becomng members of an association which is not exclusively made up of persons of the same category or which is affiliated with another organization. Strikes are prohibited under penalty.

In 1919 a police strike occurred in London. As a result, the English Government passed a law forbidding the police in the future to belong to any trade union, other than the Police Federation, or to participate in any trade dispute.[7]

On page 81 of his book Mr. Rhyne says:

"The attorneys general of at least fifteen states have had occasion to render opinions or rulings, which to the extent known, are summarized here, and these opinions are also set forth in full in the appendices. The majority of these opinions regard labor union contracts between municipalities or other units of government and unions representing governmental employes as unauthorized in law. Notable exceptions are the California opinions, and possibly the Utah and Wisconsin opinions which distinguish between mandatory and voluntary consummation of labor union contracts. The Nebraska opinion is in-

[7] *Halsbury's Laws of England*, Second Edition, Vol. 25, p. 343; Warren B. Catlin, *"The Labor Problem in the United States and Great Britain"* (1926), p. 494.

> clined to recognize an existing right of 'limited collective bargaining' shorn of all economic sanctions and pressures exerted by employes, and the Washington opinion recognizes the power of a utility district, with broad statutory powers to contract with a union."

It is concluded that because of their status as guardians of the public safety, police officers occupy a peculiar position insofar as their relationship to labor unions is concerned and that public policy forbids that they be permitted to be members of or represented by the same union which represents other workers.

Public Policy As Expressed in Judicial Decisions

In the case of *Railway Mail Association vs. Corsi*, 326 U. S. 88 (1945), this Court said the following on page 95:

> "Under customary practices government employees do not bargain collectively with their employer."

In the case of *Hagerman vs. Dayton*, 147 Ohio St. 313, decided by the Supreme Court of Ohio on January 22, 1947, the Court held invalid a municipal ordinance authorizing a voluntary check-off of union dues of public employees. On page 327 the Court said:

> "Under Section 6346-13, General Code, as it stood at the time of the passage of Ordinances No. 15776 and No. 15937, any assignment of, or order for, wages or salary was invalid in the absence of a contract such as described in Section 6346-13, General Code. We are of the opinion that a municipal corporation of the State of Ohio does not come within the meaning of 'employers' as used in Section 6346-13, General Code. We are also of the opinion that civil service appointees do not come within the definition of 'employes' as used in such section."

On page 328 the Court said:

"There is no municipal purpose served by the check-off of wages of civil service employees. Counsel for appellees argue that a check-off is a convenience to both the municipal appointee and the labor union. We must be realistic and take judicial notice, or what is generally known, that the check-off is a means of maintaining membership. Indeed, the record in this case shows that each so-called contract member is required to give a cognovit note for twenty months dues in advance and these proposed check-off payments are to be applied on such notes. The check-off is contrary to the spirit and purpose of the civil service laws of the state."

Beginning on the same page it is further stated:

"Under this section of the Constitution and the laws enacted pursuant thereto, labor unions have no function which they may discharge in connection with civil service appointees."

On page 329 the Court said:

"The laws of this state, the regulations of the civil service commissions, state and municipal, and the valid ordinances of the particular municipality cover fully all questions of wages, hours of work and conditions of employment affecting civil service appointees. Municipal civil service appointees are to be appraised and promotions are to be made in individual cases according to merit, fitness and seniority. There is no authority for the delegation either by the municipality or the civil service appointees of any functions to any organization of any kind. Each tub must stand on its own bottom. The law provides for the election and appointment of officials whose duties would be interfered with by the intrusion of outside organizations. Nothing said herein is intended to limit free speech but it is intended to limit interference by *organizations* with the duties of duly elected and appointed officials."

In the case of *Fraternal Order of Police vs. Harris*, 306 Mich. 68, 10 N. W. (2d) 310 (1943), it is stated beginning at page 312:

> "The constitution and by-laws of plaintiff's national, state and local organizations which were received in evidence provide in effect that citizens may become associate members upon payment of dues of not less than $5 per year, and such associate members will be furnished 'a membership card and car emblem.' One would be naive, indeed, to assume that such automobile emblem did not carry with it the intimation of special privileges to associate members. This of itself is enough to require the determination that the existence of plaintiff organization within the law enforcement body of a municipality is contrary to public policy."

In the case of *McNatt vs. Lauther*, 223 S. W. 503 (Tex. Civ. App., 1920), the Court sustained the discharge of a city fireman for disobedience of a rule against joining a labor union. On page 506 the Court said:

> "The board of commissioners of the city of Dallas had the interest of the public, as well as the employes of the city, to consider. In addition to the considerations stated in the quotations above referred to, the commissioners may have taken into consideration the effect of the increased probability of strikes by the policemen or firemen of the city, as a body, if such employes were permitted to become members of an organization which might bind them to act as a body in such matters. The dire consequences of such a strike has been exemplified in the comparatively recent strike of the policemen of the city of Boston. The adoption of the ordinance referred to or similar rules and regulations, may have been the result of a purpose to minimize, as far as possible, the probability of some such calamity in the city of Dallas."

Public Policy As Expressed in Statements of Public Officials

Beginning on page 106 of his book on "*Labor Unions and Municipal Employe Law,*" Mr. Rhyne discusses the Boston Police Strike of 1919. It will be recalled that it was his handling of this incident which brought Calvin Coolidge before the public and had much to do with his later becoming President of the United States. In taking action to stop the strike, *Calvin Coolidge* said:

> "There is no right to strike against the public safety by anybody, anywhere, at any time."

In commenting on the same incident, President *Woodrow Wilson* termed the strike "an intolerable crime against civilization."[8]

In a letter written on August 16, 1937, to Mr. Luther C. Steward, President of National Federation of Federal Employees, President *Franklin D. Roosevelt* said:

> "Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of government employes. Upon employes in the federal service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of government activities. This obligation is paramount. Since their own services have to do with the functioning of the government, a strike of public employes manifests nothing less than an intent on their part to prevent or obstruct the operations of government until their demands are satisfied. Such action, looking toward the paralysis of government by those who have sworn to support it, is unthinkable and intolerable."[9]

[8] Rhyne: "*Labor Unions and Municipal Employe Law,*" p. 107.

[9] Rhyne: "*Labor Unions and Municipal Employe Law,*" p. 437.

In July of 1939, when the W.P.A. strikes were in progress the then Attorney General, *Frank Murphy* (now Mr. Justice Murphy), announced to the press that public employees did not have the right to strike. When asked whether he would differentiate between the fundamental and the proprietary activities of the government, the Attorney General remarked that a somewhat different situation prevailed as between the two activities but that "there ought to be no strikes against the government."[10]

On April 7, 1941, *F. H. LaGuardia*, then Mayor of New York City, in a letter to the Chairman of the Board of Transportation said:

> "The city does not and cannot recognize the right of any group to strike against the city."[11]

In an opinion dated April 25, 1944, Chicago Corporation Counsel *Barnet Hodes* said the following:

> "The police officers individually or collectively have no right to strike for any reason at any time under any circumstances."[12]

In an opinion dated November 27, 1945, *George L. Stemmler*, City Counselor of St. Louis, Missouri, stated:

> "Inherent in the concept of a union is the idea of a group separate and apart and, in a sense, antagonistic to its employer. The labor union has, as the very essence of its being, the basic principle that the rights of its members are in contraposition to the rights and interests of the employer and that its members must band together for concerted action against the employer. When it is considered that the police force is an integral part of 'the people' themselves, it will be readily apparent how utterly incongruous would be any attempt by the members

[10] *New York Times*, July 14, 1939, page 4, column 2.

[11] Rhyne: *"Labor Unions and Municipal Employe Law,"* page 193.

[12] Rhyne: *"Labor Unions and Municipal Employe Law,"* page 100.

of the police force to set themselves up as a group independent of, or separated from, or distinguished from, 'the people' as a whole.

"Implicit in the idea of a union is the idea of concerted action to enforce its demands; that is, the right to strike. The right to strike against 'the people' themselves is repulsive even to those now attempting to unionize the police force as evidenced by their attempted emasculation of the union by the provision that it shall not have the right to strike.

"It is my opinion, however, that, in a matter so vitally affecting the welfare of the people as a whole, we must, above all things, be practical and exercise the utmost of common sense. As practical individuals we know that, regardless of this attempt to forbid strikes, there would always be present the incipient threat of a strike against 'the people.'

"I realize that the Board is entirely sympathetic to the trend of the times looking toward the dignifying of the status of the individual as such. However, the banding together of the members of the police force in a labor union is so foreign to the fundamental conception of the nature and characteristics of a police force that it is, in my opinion, the duty of your Board to take the position that membership in a labor union is just grounds for disciplinary action as outlined in your Police Manual."[13]

Under date of March 6, 1946, Mr. *Fletcher Bowron*, Mayor of Los Angeles, California, wrote a letter to the City Council in which he said the following:

"I feel that a police union has no place in the organization of the Police Department of this city, or in any government, and its existence, certainly its official recognition, is contrary to sound public policy and against the public interest.

"A labor union of peace officers is repugnant to the very principles of democracy, the form and pur-

[13] Rhyne: *"Labor Unions and Municipal Employe Law,"* page 364.

pose of representative free government. Unsettled conditions and numerous strikes, with accompanying violence, in various cities throughout the country, including recent strikes in Los Angeles, have demonstrated to every unbiased and fairminded citizen that police officers, sworn to support the Constitution of the United States and of this state, and whose duty it is to uphold and enforce the law equally and without fear or favor towards all, must be neutral in fact as well as in appearance in all matters where organized labor is involved.

"Los Angeles police officers have not failed in their duty, but the example of other police forces which are unionized has demonstrated that peace officers should not be members of a labor union. After investigation of facts relating to a so-called jurisdictional strike in this county (but in which all acts of violence occurred outside of the limits of the City of Los Angeles, a subcommittee of the Assembly Committee on Governmental Efficiency and Economy of the California Legislature reached the conclusion that there had been a serious breakdown in the maintenance of law and order and recommended 'that the Legislature enact a law prohibiting a peace officer's being a member of any labor union.' This recommendation could not be considered at the recent special session of the Legislature, and if a statute is enacted at the next regular session, we may not expect a state law on this subject for a year and half. Moreover, in this chartered city, the employment, regulation and discharge of police officers comes within the scope of a municipal affair and therefore may not be controlled by general laws of the state.

"I deem it proper for the City of Los Angeles to fix and determine its own policy in this matter and I urge the City Council to support me, as the executive officer of the city, in the administrative policy which I propose to put into effect, which is as follows: *that no police officer of the Los Angeles Police Department shall be a member of any labor union.*"[14]

[14] Rhyne: *"Labor Unions and Municipal Employe Law,"* page 311.

In October, 1946, Mr. *George N. Schoonmaker,* City Manager of Toledo, Ohio, made the following statement in a letter to union officials:

> "You recently inquired of me as to my attitude if you undertook to organize the members of the police department into a union to be affiliated with the American Federation of Labor.
>
> "It is generally conceded that association by members of police departments with any organization which on any occasion or for any purpose might attempt to control them in their relations toward the public they undertake to serve, is inconsistent with the discipline which their employment imperatively requires, and therefore must prove subversive of the public service and detrimental to the general welfare. This being so, I disapprove of the attempt of anyone to organize the members of the department into a union in the sense that employees of other kinds are joined together in such organizations.
>
> "That there may be no doubt of my position, I am making this letter public with the added statement that I am instructing the director of public safety to forbid members of the department to enter into such an organization."[15]

It is true that the foregoing statements are directed to the unionization of full time public employees. However, they apply with equal force to the unionization of any peace officer who has the public duty of preserving the peace. It is clear that the weight of public opinion is against permitting peace officers to be represented by a union, particularly a union which already represents other employees having conflicting interests and which imposes upon them the obligation to strike.

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[15] *Toledo Blade,* October 7, 1946, page 15, column 8.

It Would Be Against Public Policy To Enforce the Board's Order in this Case

We have shown from the foregoing statutes, judicial decisions and statements of public officials that it is generally agreed that it is against public policy to permit strikes by public employees, and particularly those whose duty it is to protect the public safety. We have also shown that the duties of the plant guards are public duties relating to the public safety. We have also pointed out that the obligations which the plant guards are required to take when becoming members of the union imposes upon them the duty to strike when called upon to do so by the union. We have also shown that in the performance of their public functions as peace officers they are, in effect, public employees and as such exempt from the coverage of the Act. It is clear that, when they are performing their monitorial duties, they are also acting in the interests of their employer and are therefore employers within paragraph 2 of Section 2 of the Act. It is clear that it was never the intent of Congress to include public peace officers within the coverage of the Act. It, therefore, seems clear that it is against public policy to enforce the Board order, which if enforced, would give the plant guards the right to bargain collectively through the same union representing the production workers which necessarily carries with it the right to strike in their own interests and the duty to strike when called upon by the union which represents them.

If it be contended that the right to organize and be represented by the same union as that which represents the production workers does not necessarily carry with it the right to strike, then we submit that such a contention must be considered "in light of the realities of the industrial world"[16] and, when so considered, we cannot conceive such workers exercising one right without exercising the other.

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[16] *Anderson vs. Mt. Clemens Pottery Co.*, — U. S. —, 66 S. Ct. 1187, 1195 (1946).

If it be contended that the plant guards should not be asked to give up their rights to bargain collectively or to take concerted action to protect their own interests, then we call the Court's attention to the fact that public peace officers have never had that right.

In the case of *McAuliffe vs. Mayor*, 155 Mass. 216, 29 N. E. 517 (1892), Holmes, J., speaking for the Court, said on page 517:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him."

So in this case, when the plant guards accepted employment as such, they waived whatever rights they otherwise would have had to join and be represented by the union.

In the case of *Brownell vs. Russell*, 76 Vt. 326, 57 A. 103 (1904), the Court said on page 104:

> "We think the removal of the police force from the field of active politics is calculated to promote the efficiency of the force and the purity of municipal government, and that the rule adopted imposes no greater restriction than is reasonably necessary to the accomplishment of this purpose."

In the case of *Coane vs. Geary*, 298 Ill. App. 199, 18 N. E. (2d) 719 (1939), the Court beginning on page 722, quoted with approval from a lower court opinion as follows:

> "A police force is peculiar, *sui generis*, you may say, in its formation and in its relation to the city government. It is practically an organized force resembling in many respects a military force, organ-

ized under the laws of the United States and equally as important as to the functions it is required to perform.

"It is not an ordinary branch of the executive government like the mayor's office, even, your water department, the comptroller's department, the health department, even; but, as I say, it is peculiar to itself, and to look at it in the same light that other branches of the executive department are regarded would be a mistake in a judicial decision. It is a department which requires that the members of it shall surrender their individual opinion and power to act, and submit to that of the controlling head just as much as the common soldier must surrender his own opinion and power of action to that of his commanding officer. And there is the same necessity of discipline, of regulation existing in the police department that exists in regard to the military department."

In the case of *Fraternal Order of Police vs. Harris*, 308 Mich. 68, 10 N. W. (2d) 310 (1943), the Court said on page 312:

"Those who serve the public, either as the makers of the law, the interpreters of the law, or those who enforce the law, must necessarily surrender, while acting in such capacity, some of their presumed private rights."

To say that the order of the Board shall be enforced is to say that the right of individuals to join together for the purpose of collective bargaining is paramount to the public interest. The right of workers to self-organization and to bargain collectively through representatives of their own choosing was only one of the objectives which the National Labor Relations Act was designed to protect. To say that the protection of such right is paramount to all other rights and objectives would be to interpret the Act with that single-mindedness which this Court so heartily

condemned in *Southern Steamship Co. vs. N. L. R. B.*, 316 U. S. 31 (1942).

In the case of *N. L. R. B. vs. E. C. Atkins & Co.*, 147 F. (2d) 730 (C. C. A. 7, 1945), the Court well said on page 742:

> "A more cogent reason, however, why enforcement should not be allowed is that to do so would be or be likely to be inimical to the public welfare. The Board in its order entirely ignores the unusual status occupied by members of the plant guard by reason of their enrollment for service with the military. As heretofore shown, they are largely if not entirely under the control and direction of the War Department. They wear the uniform of a soldier, owe the same allegiance, receive their authority and commands from the same source, are enlisted for the duration of the war for service with the Army, and are engaged in the performance of a service essential to the successful prosecution of the war."

In the case of *Church of the Holy Trinity vs. United States*, 143 U. S. 457 (1892), it is said on page 459:

> "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."

If it be successfully contended that the unionization of plant guards is within the letter of the statute, then certainly it is not within its spirit or within the intention of Congress and, therefore, it would be against public policy to enforce the order of the Board.

Respectfully submitted,

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APPENDIX

OHIO CONSTITUTIONAL AND STATUTORY PROVISIONS RELATING TO DUTIES AND RESPONSIBILITIES OF DEPUTY SHERIFFS

Under the laws of Ohio, deputy sheriffs are peace officers charged with public responsibilities.

Section 7 of Article XV, of the Constitution of Ohio, provides as follows:

> "Every person chosen or appointed to any office under this state, before entering upon the discharge of its duties, shall take an oath or affirmation, to support the Constitution of the United States, and of this state, and also an oath of office."

Following are the provisions of the *Ohio General Code* relating to this subject:

> "*Section 2. All officers must take an oath of office.* Each person chosen or appointed to an office under the constitution or laws of the state, and each deputy or clerk of such officer, shall take an oath of office before entering upon the discharge of his duties. The failure to take such oath shall not affect his liability or the liability of his sureties."
>
> "*Section 3. Oath of office of judges and other officers.* The oath of office of each judge of a court of record shall be to support the constitution of the United States and the constitution of this state, to administer justice without respect to persons, and faithfully and impartially to discharge and perform all the duties incumbent on him as such judge, according to the best of his ability and understanding. The oath of office of every other officer, deputy or clerk, shall be to support the constitution of the United States and the constitution of this state, and faithfully to discharge the duties of his office."

"*Section 9. Deputies and clerks, their terms, etc.* A deputy, when duly qualified, may perform all and singular the duties of his principal. A deputy or clerk, appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him. The principal may take from his deputy or clerk a bond, with sureties, conditioned for the faithful performance of the duties of the appointment. In all cases the principal shall be answerable for the neglect or misconduct in office of his deputy or clerk."

"*Section 2830. Deputy Sheriffs.* The sheriff may appoint in writing one or more deputies. If such appointment is approved by a judge of the court of common pleas of the subdivision in which the county of the sheriff is situated, such approval at the time it is made, shall be indorsed on such writing by the judge. Thereupon such writing and indorsement shall be filed by the sheriff with the clerk of his county, who shall duly enter it upon the journal of such court. The clerk's fees therefor shall be paid by the sheriff. Each deputy so appointed shall be a qualified elector of such county. No justice of the peace or mayor shall be appointed such deputy."

"*Section 2831. Responsible for conduct of deputies.* The sheriff shall be responsible for neglect of duty or misconduct in office of each of his deputies."

"*Section 2833. General powers and duties of the sheriff.* Each sheriff shall preserve the public peace and cause all persons guilty of breach thereof, within his knowledge or view, to enter into recognizance with sureties to keep the peace and to appear at the succeeding term of the common pleas court of the proper county and commit them to jail in case of refusal. He shall return a transcript of all his proceedings with the recognizance so taken to such court and shall execute all warrants, writs and other process to him directed by proper and lawful authority. He shall attend upon the common pleas court

and the court of appeals during their sessions, and, when required, upon the probate court. In the execution of the duties required of him by law, the sheriff may call to his aid such person or persons or power of the county as may be necessary. Under the direction and control of the county commissioner, he shall have charge of the court house."

"*Section 2834. Duty to execute and return process.* The sheriff shall execute every summons, order or other process, make return thereof as required by law and exercise the powers conferred and perform the duties enjoined upon him by statute and by the common law."

"*Section 12819. Carrying of concealed weapons prohibited; penalty.* Whoever carries a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person shall be fined not to exceed five hundred dollars, or imprisoned in the county jail or workhouse not less than thirty days nor more than six months, or imprisoned in the penitentiary not less than one year nor more than three years. Provided, however, that this act (G. C. Sec. 12819) shall not affect the right of sheriffs, regularly appointed police officers of incorporated cities and villages, regularly elected constables, and special officers as provided by sections 2833, 4373, 10070, 10108 and 12857 of the General Code to go armed when on duty. Provided further, that it shall be lawful for deputy sheriffs and specially appointed police officers, except as are appointed or called into service by virtue of the authority of said sections 2833, 4373, 10070, 10108 and 12857 of the General Code to go armed if they first give bond to the state of Ohio, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them; and any person injured by such improper use may have recourse on said bond."

"*Section 13432-1. Officer may arrest on view.* A sheriff, deputy sheriff, marshal, deputy marshal, watchman or police officer, herein designated as 'peace officers' shall arrest and detain a person found violating a law of this state, or an ordinance of a city or village, until a warrant can be obtained.

A constable within the limits of the township in which said constable has been appointed or elected, shall arrest and detain a person found by him in the commission of a misdemeanor, either in violation of a law of this state or an ordinance of a village, until a warrant can be obtained."

"*Section 13432-3. Duty of peace officer arresting without warrant.* When a peace officer has arrested a person without a warrant, he must without unnecessary delay, take the person arrested before a court or magistrate having jurisdiction of the offense, and must make or cause to be made before such court or magistrate a complaint stating the offense for which the person was arrested."

"*Section 13432-9. When warrant shall issue.* When an affidavit charging a person with the commission of an offense is filed with a judge, clerk or magistrate, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused; if the offense charged is a violation of the laws of the state, such warrant may be directed to and executed by any officer named in Section 1 of this chapter, but if the offense charged is a violation of the ordinance or regulation of a municipal corporation, such process shall be directed to and executed by the officers of such corporation."

"*Section 13432-24. Power of arrest, how affected.* Nothing in this chapter shall be deemed or construed to affect or modify the power of arrest vested by law in other persons or officers than those named in section 1 of this chapter."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

NO. 418.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

JONES & LAUGHLIN STEEL CORPORATION,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

RESPONDENT'S PETITION FOR A REHEARING AND FOR INCIDENTAL RELIEF.

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INDEX.

PAGE

Respondent's Petition for a Rehearing and for Incidental Relief 1

Certificate of Counsel 14

TABLE OF CASES.

Maryland Dry Dock Company, In re, 49 N.L.R.B. 733 (May 11, 1943) 7

N.L.R.B. v. E. C. Atkins and Co., ... U. S. ..... (decided May 19, 1947) 5

N.L.R.B. v. Jones & Laughlin Steel Corporation, 154 Fed. (2d) 932 (April 4, 1946) 1, 3, 11

Packard Motor Car Company v. N.L.R.B., ... U. S. ..... (decided March 10, 1947) 8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

NO. 418.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

JONES & LAUGHLIN STEEL CORPORATION, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

RESPONDENT'S PETITION FOR A REHEARING AND FOR INCIDENTAL RELIEF.

Jones & Laughlin Steel Corporation, the respondent in this case, presents this, its petition for a rehearing of this case, and in support thereof respectfully shows the following matters of fact and law:

FIRST: This case was argued before the Court on March 7, 1947, upon a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Sixth Circuit, reported as *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 154 Fed. (2d) 932 (April 4, 1946).

SECOND: By its decision aforesaid, the Circuit Court of Appeals had held invalid a Certification of Rep-

resentatives issued by the National Labor Relations Board on June 5, 1943 (R. 34) and a final Order based by the Board upon the Certification (R. 77). By the Board's Certification and final Order, the respondent Steel Corporation had been commanded to recognize and bargain with the United Steelworkers of America as the exclusive representative, under the National Labor Relations Act, of a force of about sixty armed and uniformed policemen, employed to enforce Company rules and public laws in respondent's Otis Works, at Cleveland, Ohio. During the recent war, and at the time of the Certification, these policemen had been enrolled by the United States Army as Auxiliary Military Police. At all other times they had been sworn and commissioned as peace officers of the State of Ohio. The Union had been qualified and recognized for years as exclusive representative of the 4,700 rank and file steel workers, employed in the Otis works, and subject from day to day to the public and private authority of the plant policemen. The validity of the Certification and final Order had been questioned by the respondent, both before the Board and in the Circuit Court of Appeals, upon these grounds:

1. That the authority of the Board, in such cases, was limited by the words and implications of the National Labor Relations Act, in such manner as to forbid the making or enforcement of any order of the Board which would tend to subvert any generally important public interest, such as the public interests in the enforcement of law and order in large industrial establishments, and in the military security of such establishments in time of war.

2. That an order of the Board which would subject the Otis Works policemen to compulsory representation by a Union dominated by its numerically superior membership of rank and file steel workers would, if enforced, necessarily tend to impair the freedom of the policemen to enforce Company rules and public laws against rank and file Union members, and thereby to subvert the public interests aforesaid.

It was upon these grounds that the Circuit Court of Appeals sustained the respondent's contention that the Board's final Order must be denied enforcement. That Court said, *inter alia* (154 Fed. (2d) pp. 934-935):

"* * * The precise question here is not whether the plant guards should be permitted to organize, but whether the peculiar classification into which they fall makes it improper for the Board to permit their organization by the same union which represents the production employees. * * *

"As pointed out in the previous opinion [146 Fed. (2d) 718], it is the duty of the Board to consider the public interest as a material factor in selecting appropriate units for collective bargaining. * * * We adhere to our conclusion that in the order involved here the Board failed to give adequate consideration to the public welfare. A contrary conclusion would open wide the door to disorderly and criminal acts because of the limitation which the Board's order places on the power of the Government to furnish adequate police protection."

THIRD: On May 19, 1947, this Court handed down its decision of the case. The opinion of this Court (not

yet reported) was written by Mr. Justice MURPHY and concurred in by Mr. Justice REED, Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE. By this opinion, the Court determined that the judgment of the Circuit Court of Appeals should be reversed, and that the Board's final order should be enforced against the respondent. The CHIEF JUSTICE, Mr. Justice FRANKFURTER, Mr. Justice JACKSON and Mr. Justice BURTON dissented, substantially for the reasons set forth in the opinion of the Court below, which has been described.

FOURTH: There had been no prior judicial decision of the point presented here, except that of the Court below in this case. From the language of the opinion of Mr. Justice MURPHY, deciding this case, it appears that the majority of this Court for whom he spoke have based the decision of the case upon the Board's own interpretations of the Act, in certain past cases in which the Board has held that industrial policemen may be subject to compulsory and exclusive union representation under the National Labor Relations Act, even though they have assumed obligations as individual members of municipal police forces. On this point, the majority opinion said:

> "The Board has frequently considered the status of plant guards who have been deputized as deputy sheriffs or special police. Where the private employer retains the right to fix the wages, hours or other working conditions of such guards, the Board's uniform conclusion has been that they are employees of the private employer and that they retain their rights under the National Labor Relations Act. See, *e. g., Luckenbach Steamship Co.*, 2 N.L.R.B. 181, 189; *American-Hawaiian Steamship*

Co., 10 N.L.R.B. 1355, 1363-1364; *American Brass Co.*, 41 N.L.R.B. 783, 785; *Bethlehem-Fairfield Shipyard, Inc.*, 61 N.L.R.B. 901, 905-906; *Standard Steel Spring Co.*, 62 N.L.R.B. 660, 662-663. * * *

"We find it impossible to say that the Board is wrong in adopting this policy as to deputized guards. * * *

"Deputized guards bear the same relationship to management that non-deputized guards bear, a relationship that we discussed in the *Atkins* case,[1] ante, p. ....; and that we found to be adequate for the Board to find the existence of an employer-employee status. Likewise, their relationship to police or municipal authorities is not one that is necessarily inconsistent with their status as employees under the Act. Union membership and collective bargaining are capable of being molded to fit the special responsibilities of deputized plant guards and we cannot assume, as a proposition of law, that they will not be so molded. If there is any danger that particular deputized guards may not faithfully perform their obligations to the public, the remedy is to be found other than in the wholesale denial to all deputized guards of their statutory right to join unions and to choose freely their bargaining agents."

FIFTH: It is respectfully submitted that the Board's earlier decisions, cited and relied upon by this Court in the passage of its opinion which has been quoted, are of doubtful value in this case, for the following reasons:

1. In each of the Board's earlier decisions,

[1] *N.L.R.B. v. E. C. Atkins and Co.*, also decided by this Court on May 19, 1947, and not yet reported.

cited here, it was made clear that, although the policemen were "deputized," their public duties were, at the time the Board considered them, of little or no importance. In contrast, it has been stipulated in this case (R. 116) that the Otis Works is physically an extremely large and extremely complex industrial establishment; and that because of its magnitude and other characteristics *"its police protection by the ordinary police of the City of Cleveland is not practical or feasible; and, as a result, for a great many years, the police protection of the Works and the enforcement of law, peace and good order therein has been delegated wholly to the plant guard force."* (Italics supplied) Thus, although the public interest in the independence and efficiency of the guards in the earlier cases was small, in this case it is great.

2. It was not established by the Board's earlier decisions cited here, that representation, by a rank and file controlled Union, of guards or other agents exercising the proper authority of management or the law over the rank and file, would not or could not tend to impair the freedom and efficiency of the individual guards to discharge their public and private duties as such. Instead, these earlier cases were controlled by the absence of any substantial public or private need for the freedom or efficiency of the guards they affected from labor union obligations. Where the question has been raised (in any but the most recent cases—such as this case and those involving the still unsettled status of foremen and supervisors), the Board has always recognized that the loyalty legitimately demanded of its

members by every labor union is incompatible as a matter of law with the duties of an employee who exercises the authority of management over union members. To cite one, historically important example of the Board's recognition of this application of an anciently established principle, in the case of the *Maryland Drydock Company,* 49 N.L.R.B. 733 (May 11, 1943), the Board said (p. 740):

"The very nature of a foreman's duties make him an instrumentality of management in dealing with labor. * * * To hold that the National Labor Relations Act contemplated the representation of supervisory employees by the same organization which might represent the subordinates would be to view the statute as repudiating the historic prohibition of the common law against fiduciaries serving conflicting interests."

3. Furthermore, repeating a point or points made in the respondent's printed brief in this Court, the Board's present contention that, because industrial police are "employees" under the Act, they must be subject without restriction to compulsory representation by rank and file unions under the Act is, despite its acceptance by the majority opinion in this case, wholly inconsistent with the Board's own interpretations of the Act prior to 1942. The Board's earlier decisions, amongst them that in the *Maryland Drydock Company* case just cited, are referred to in the respondent's principal brief. They show that, until about 1942, the Board—and generally the labor unions also—construed the Act to mean that a line must be drawn between union labor, on the one hand, and non-union management

on the other; and that no union (or at least no rank and file union) could be qualified as exclusive representative of any essential element of managerial agents. It is true that, under this earlier rule, some "foremen," some "guards" and even some "deputized guards" were included in union bargaining units, as they were in the cases here relied upon by the Board and the opinion of this Court; but it was always because, in spite of their titles, their duties to management were—as a matter of fact—wholly compatible with union membership and its obligations. In this fact lies the reason why, although the Act is almost twelve years old, such cases as this case and the *Packard Motor Car Company* case, ... U. S. ..., decided March 10, 1947, are cases of first impression. Until a very recent period, no case involving any group of supervisors or industrial police, or other agents, whose undivided allegiance was actually required by any industrial management, had been pressed to any significant conclusion before the Board, or considered by any federal Court.

SIXTH: As the opinion of this Court declares, the question presented in this case is one to be resolved by interpreting the language of the Act, and so discovering the intentions of Congress as they are expressed in the Act. As is contended in the respondent's principal brief, the correctness of the Board's own original interpretation—that the Act required it to draw and maintain a line between union labor and non-union management, is strongly indicated by the informed acquiescence of Congress in that interpretation, through a period of at least seven years. In contrast to this, it now appears that

the Board's new rule, that any group of "employees" may be subject to union representation under the Act, no matter what may be their obligations as agents of management, is a rule which cannot enjoy the approval or the acquiescence of Congress. Instead, during the present session of Congress, a number of Bills have been introduced in efforts to disestablish the Board's new rule, and to reestablish its original rule.

One of these Bills, H. R. 3020, the "Taft-Hartley Bill," is intended to make a number of amendments to the National Labor Relations Act. Some of these proposed amendments have been the subjects of much controversy in Congress; but there are others to which no member of either House has thus far taken any serious exception[2]. Amongst these latter are, as a reading of the debates will show, an amendment of Section 2 (3) of the Act which would exclude from the definition of "employee," for the purposes of the Act, every super-

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[2]In the single material instance in which the now material sections of the Bill have been criticized adversely by the opponents of the Bill, the criticism approved the doctrine relied upon by the Sixth Circuit Court of Appeals in this case and the *Packard Motor Car Company* case: that agents of management in its dealings with rank and file labor should not be represented by rank and file unions. In the debates upon the Senate's original version (S. 1126) of the Taft-Hartley Bill, on May 1, 1947, Senator PEPPER, speaking in behalf of those who were opposed to the bill as a whole said (*Congressional Record*, May 1, 1947, p. 4490):

> "* * * We have never contended that a foreman should have a right to become a member of the union to which the employees en masse belong. I think of a foreman as related to the industrial organization, as being like a sergeant in the Army; I recognize the necessity for certain distinctions be-

visory employee who is obliged as such to exercise the authority of management over union labor; and, secondly, an addition or clarification of Section 9 of the Act, contained in Section 9 (b) of the Bill, which would forbid the qualification of any rank and file union, such as that involved here, as exclusive representative of such industrial policemen as those who serve in the Otis Works. The material portions of Section 9 (b) of the Bill, contained in a Conference Report submitted to the House of Representatives on June 3, 1947, and to the Senate on the next day, read as follows (*Congressional Record*, June 3, 1947, p. 6454):

"Sec. 9. * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not * * * (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative

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tween even non-commissioned officers and those who serve in the ranks in our armed forces; but, Mr. President, to exclude foremen from membership in the union to which the mass of the workers belongs does not mean that we have to deny to the foremen the right to make common cause to better their common lot."

of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

That this proposed amendment is intended to clarify the intentions of Congress upon the question in dispute in this case, by endorsing the view relied upon by the Circuit Court of Appeals and accepted as a sound one, as has been observed, by such critics of the Bill as Senator PEPPER, and by rejecting the contrary view urged here by the Board, is shown by the debates upon the Bill. As originally passed by the House of Representatives, H. R. 3020 had, by its Section 2 (12) (B), proposed to exclude wholly from the operation of the Act industrial policemen of the kind involved in this case (*Congressional Record*, April 16, 1947, p. 3607). The corresponding Bill in the Senate (S. 1126) had not included this provision. The report of the Conference Committee included the compromise provision which has just been quoted. Its purpose was explained and related to such cases as this case in an analysis of the Conference Report, presented in debate by Senator TAFT, one of the Managers in behalf of the Senate, as follows (*Congressional Record*, June 5, 1947, p. 6601):

"Section 9 (b) is also the same as section 9 (b) of the Senate amendment with the exception of an addition of a third clause relating to plant guards. As has been previously stated, the Senate rejected a provision in the House bill which would have excluded plant guards as employees protected by the act. The conferees on both sides, however, have been impressed with the reasoning of the Circuit Court of Appeals for the sixth circuit in the Jones

and Laughlin case in which an order of the Board certifying as a bargaining representative of guards, the same union representing the production employees was set aside. Although this case was recently reversed by the Supreme Court on the ground that the Board had it within its power to make such a holding, four of the Justices agreed with the Circuit Court of Appeals holding that this was an abuse of the discretion permitted to the Board under the act. One of the members of the Board has also expressed this view in a number of dissenting opinions. Under the language of clause (3), guards still retain their rights as employees under the National Labor Relations Act, but the Board is instructed not to place them in the same bargaining unit with other employees, or to certify as bargaining representatives for the guards a union which admits other employees to membership or is affiliated directly or indirectly with labor organizations admitting employees other than guards to membership."

SEVENTH: It is true that the Taft-Hartley Bill is not, as this is written, a part of the law. The Conference Report was agreed to by the House of Representatives on June 4, 1947 (*Congressional Record*, June 4, 1947, p. 6549) and by the Senate on June 6, 1947 (*Congressional Record*, June 6, 1947, p. 6695), and the Bill was presented to the President, counsel are informed, on June 9th.

As this is written (June 11, 1947), the President has taken no action upon the Bill. The period of ten days, Sundays excluded, within which he may approve or veto the Bill, will not expire until June 20th. To meet the requirements of this Court's Rule 33, this Petition for Rehearing must be filed on or before June 13th; and for

that reason it is impossible to advance the Taft-Hartley Bill here as a law.

Should the Bill become law, however, or should it fail of enactment and be supplanted by other legislation, equivalent as respects the point presented here, which is enacted during the present session of Congress, the proper and satisfactory disposition of this controversy will, it is respectfully submitted, call for a further judicial interpretation of the rights of the parties, and for a rehearing and reconsideration of the matter in this Court.

WHEREFORE, your petitioner, the respondent in this case, respectfully prays the following relief:

1. That your honorable Court shall grant and order a rehearing and reargument of this case; and

2. That the mandate of your honorable Court in this case shall not be issued until the Court shall have passed upon this petition, and not in any event until a reasonable time after the Taft-Hartley Bill amending the National Labor Relations Act (H. R. 3020, 80th Congress, First Session) shall either have failed of enactment into law, or shall have become law; and

3. That your petitioner shall be granted such other relief in the premises as the exigencies of this case and the ends of justice may require.

And your petitioner will ever pray, etc.

JOHN C. BANE, JR.,
Attorney for Respondent,
JONES & LAUGHLIN STEEL CORPORATION.

Of Counsel:
H. PARKER SHARP
PAUL J. WINSCHEL

CERTIFICATE OF COUNSEL.

I, the undersigned counsel for Jones & Laughlin Steel Corporation, the petitioner above named, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

JOHN C. BANE, JR.,
Attorney for
JONES & LAUGHLIN STEEL CORPORATION.

June 11, 1947.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 419

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

E. C. ATKINS AND COMPANY,
Respondent.

PETITION FOR REHEARING OF RESPONDENT, E. C. ATKINS AND COMPANY.

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INDEX.

	PAGE
Opinions Below	1
Action of this Court	2
Jurisdiction	2
Grounds for Petition for Rehearing	2
Statute Involved	3
Argument	4
I. This Court Erred in Considering Circular No. 15	4
1. This Court's Decision is Founded upon Circular No. 15	4
2. The Status of Circular No. 15 in this Case	4
3. This Court Erred in Taking Judicial Notice of Circular No. 15	5
4. It Would Destroy the Administrative Process to Permit Consideration by an Appellate Court of Matters Not Presented to the Administrative Tribunal	10
5. Circular No. 15 was Erroneously Used by this Court to Show that the Board's Determination had a Reasonable Basis in the Evidence Although it was not Part of the Evidence	12
II. Basis of the Judgment of this Court	13
III. The Determination of Hours and Promotion	14
1. The Board Made No Finding Respecting Hours and Promotion	14

2. This Court's Review of Evidence on Promotion and Hours of Work 16

3. The Evidence Respecting Promotions and Working Hours 16

4. This Court Erred in Finding Promotions and Hours of Work to be Matters to be Determined by Respondent 18

IV. The Determination of Wages 19

1. The Board's Findings Respecting the Determination of Wages 19

2. This Court's Review of Evidence on the Determination of Wages 19

3. The Evidence Respecting Determination of Wages 20

4. The Opinion of the Circuit Court of Appeals 21

5. This Court Erred in Holding that Wage Determination Makes the Guards Employees Under the Act 22

V. The Chief Guards Represented the Army, Not Respondent 24

1. The Importance of this Issue 24

2. There Was No Finding by the Board that the Chief Guards Represented Respondent 25

3. The Chief Guards Were Enrolled by the Army 25

4. The Chief Guards Received All Orders from the Army and None from Respondent 27

5. Respondent Could Not Give Orders to the Chief Guards 30

6. Respondent Did Not Delegate Any Power to the Chief Guards 32

7. The Chief Guards Could Not Have Represented Respondent 33

Conclusion 33

Certificate of Counsel 33

Appendix A—Pertinent Provisions of Sections 7, 8, 9 and 10 of the National Labor Relations Act 35

Appendix B—Opinion of this Court 41

TABLE OF CASES, STATUTES CITED AND MISCELLANEOUS.

Cases.

Burke v. Tregre, 86 U. S. (19 Wall) 519 7

Caha v. United States, 152 U. S. 211 8

May Department Stores Co. v. National Labor Relations Board, 326 U. S. 376 11

Standard Oil Company v. Johnson, 316 U. S. 481 ..5, 6, 7

Statutes.

Federal Register Act, 49 Stat. 501, 44 USC 305 10

National Labor Relations Act, Act of July 1935, Ch. 372, 49 Stat., 29 USC, Sec. 151 et seq. 3, 11, 14

Miscellaneous.

Library of the Supreme Court of the United States, Transcripts of Records and File Copies of Briefs (1941) 6, 7

Rules of the United States Supreme Court 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 419

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

E. C. ATKINS AND COMPANY,
Respondent.

PETITION FOR REHEARING OF RESPONDENT, E. C. ATKINS AND COMPANY.

The Respondent, E. C. Atkins and Company, respectfully prays that this Court grant a rehearing in this case.

Opinions Below.

1. The first opinion of the Circuit Court of Appeals for the Seventh Circuit denying application of the Board for enforcement of its Order on February 27, 1945 is reported in 147 F. 2(d) 730 (R. 348-366).

2. The Order of this Court granting writs of certiorari vacating the first judgment entered by the Circuit Court of Appeals and remanding the case for further consideration is reported in 325 U. S. 838.

3. The second opinion of the Circuit Court of Appeals

for the Seventh Circuit denying application of the Board for enforcement of its Order on May 31, 1946, is reported in 155 F. 2(d) 567 (R. 320-321).

4. The Decision of the Board in the representation proceeding which forms a part of the Record in this case is reported in 52 NLRB 1470 (R. 5-8). The Decision and Order of the Board in this case is reported in 56 NLRB 1056 (R. 30-42).

Action of This Court.

Having granted the Board's Petition for a Writ of Certiorari on December 23, 1946, and having received briefs and oral argument, this Court on May 19, 1947 reversed the judgment of the Circuit Court of Appeals for the Seventh Circuit which had denied enforcement to the Board's Order. The opinion of this Court is set forth in full in Appendix B, *Infra*, pp. 41-57.

Jurisdiction.

This Petition for Rehearing is filed pursuant to Rule 33 of the Rules of this Court within twenty-five days after May 19, 1947, the date upon which judgment was entered, or on or before June 13, 1947; and is supported, as such Rule requires, by a certificate of counsel to the effect that it is presented in good faith and not for delay.

Grounds for Petition for Rehearing.

1. This Court erred in taking judicial notice of Circular No. 15 issued on March 17, 1943 by Headquarters, Army Service Forces (Board's Brief, Appendix B) since that Circular No. 15 was not issued by the Secretary of War in whom the power to issue regulations was vested by Executive Order No. 8972.

2. This Court erred in considering Circular No. 15 issued on March 17, 1943 by Headquarters, Army Service Forces (Board's Brief, Appendix B) in support of the Board's Order because that Circular No. 15 was not in evidence, was not considered by the Board, and was not known to the Board at the time its Order was entered.

3. This Court erred in holding, contrary to the Record, that the relationship between Respondent and the guards was covered by Circular No. 15 issued on March 17, 1943 by Headquarters, Army Service Forces (Board's Brief, Appendix B).

4. The conclusion of this Court that the guards were employees because wages, hours and promotion remain matters to be determined by Respondent is not supported by the evidence.

5. The conclusion of this Court that Respondent delegated to the Chief Guards power to determine the guards' working hours and the promotion policies in regard to them is not supported by the evidence.

6. This Court erred in holding, contrary to the evidence, that the Chief Guards represented Respondent when, in fact, they represented the Army.

Statute Involved.

The pertinent provisions of Sections 7, 8, 9 and 10 of the National Labor Relations Act (Act of July 5, 1935, Ch. 372, 49 Stat. 449, 29 USC, Sec. 151, *et seq.*) are set forth in Appendix A. *Infra*, pp. 35-41.

ARGUMENT.

I.

This Court Erred in Considering Circular No. 15.

1. This Court's Decision Is Founded Upon Circular No. 15.

The opinion of this Court tests the status of the plant guards at Respondent's plants almost wholly by a detailed summary of Circular No. 15, issued on March 17, 1943 by Headquarters, Army Service Forces. This is supplemented by a brief review of the evidence contained in the Record, but only as corroborative of the conclusions reached from Circular No. 15. Thus the review of the actual evidence begins:

> "The evidence and testimony submitted to the Board confirmed the fact that the plant guards in respondent's two plants were militarized in accordance with the foregoing regulations."[1]

Thus the opinion rests almost wholly upon Circular No. 15. Since, as will be demonstrated in this Part of this Petition, Circular No. 15 was not available for consideration by this Court, rehearing should be ordered.

2. The Status of Circular No. 15 in This Case.

Circular No. 15 never became part of the Record in this case. It was not presented or mentioned in either the representation or unfair labor practice hearing before the Board. The Board itself did not refer to it in its Decision and Direction of Election (R. 5-8); in its Certification of Representatives (R. 17); in its Intermediate Report (R. 33-42); or in its Decision and Order (R. 30-33). No-

1. It is incredible that militarization, beginning on July 30, 1942 (Stip. p. 2), took place in accordance with Circular No. 15 issued March 17, 1943 (Board's Brief, Appendix B, pp. 134-160).

where is there any evidence that Circular No. 15 was known to Respondent, or to the plant guards, or to the Union. Much less is there any basis for finding that it governed the relations between Respondent and the plant guards.

Circular No. 15 first appeared as an "Addendum" to the Brief filed by the Board September 18, 1944 in the Circuit Court of Appeals for the Seventh Circuit. (Board's Brief, pp. 20-44). Respondent promptly filed with that Court a motion to require the Board to conform its brief to the rules of that Court by striking therefrom Circular No. 15. The Circuit Court of Appeals overruled that motion, and in its opinion took judicial notice of the document (R. 353). That error was asserted by Respondent in its brief before this Court.

3. This Court Erred in Taking Judicial Notice of Circular No. 15.

In a footnote to its opinion, this Court says:

> "Circular No. 15 was not introduced into evidence in the proceeding before the Board. But it was issued by military authorities pursuant to the power vested in the Secretary of War by Executive Order No. 8972 and we may take judicial notice of it. *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 483-484."

It is submitted that under the prior decisions of this Court it cannot take judicial notice of such a document; and that *Standard Oil Company* v. *Johnson*, 316 U. S. 481, 483-484, is not a precedent for the proposition that it can.

First, it is necessary to consider the nature of Circular No. 15. It is issued by "W. D. Styer, Major General, General Staff Corps, Chief of Staff" (Board's Brief, Appendix B, p. 157). It purports to be issued "By command of Lieutenant General Somervell." (Board's Brief, Appendix B, p. 157). Circular No. 15 does not purport to be issued by, or at the direction of, the Secretary of War.

Neither General Styer nor General Somervell, was a person authorized or directed by Congress or by Executive Order to issue regulations on this subject.

The applicable Executive Order is No. 8972, dated December 12, 1941, which is set forth verbatim in a Reply Memorandum filed by Respondent in the Circuit Court of Appeals (R. 344-345). That order gives authority only to the Secretary of War.

The Secretary of War, on July 2, 1942, issued a letter to various officers directing that guard forces be organized. This letter (Board's Brief, Appendix B, pp. 157-159) was signed by Major General J. A. Ulio, the Adjutant General, but it was done "By order of the Secretary of War."

It thus appears that only the Secretary of War was authorized and directed by Executive Order to establish guard forces; and that Circular No. 15 was not issued by him or at his direction.

This Court's opinion in *Standard Oil Company* v. *Johnson*, 316 U. S. 481, 483-484, does *not* decide that this Court can take judicial notice of such a document. First, there was no judicial notice question in that case. The regulations there involved were set forth verbatim in the complaint and were expressly admitted in the answer.[2] Thus

2. *Library of the Supreme Court of the United States, Transcripts of Records and File Copies of Briefs (1941)*, Vol. 159, Case No. 1125, *Standard Oil Co.* v. *Johnson*, Transcript of Record, Complaint, page 4:

"VI.

Attached hereto and marked Exhibit A is a true copy of Army Regulations No. 210-65 issued by the War Department on June 29, 1929, together with copies of amending and supplementary regulations thereto marked Exhibits B to H, inclusive, as they appear in Army Regulation 210-65, C-3 and War Department Circulars issued by the War Department from time to time, subsequent to June 29, 1929, as indicated thereon. Said Exhibits A to H, inclusive, are hereby incorporated herein as fully as though set forth at length herein. The post exchanges referred to in paragraph IV hereof were organized

they were properly before the Court as admitted facts, and there was no problem of judicial notice presented.

Further, this Court's opinion in *Standard Oil Company* v. *Johnson*, 316 U. S. 481, nowhere mentions judicial notice.

Finally, the regulations involved in *Standard Oil Company* v. *Johnson*, 316 U. S. 481, were of a different nature than Circular No. 15. As appears from the Transcript of Record in that case (*Library of the Supreme Court of the United States, Transcripts of Records and File Copies of Briefs* (1941), Vol. 159, Case No. 1125, pp. 7-71), those regulations were signed "By order of the Secretary of War." As appears from this Court's opinion in that case, the Secretary of War was authorized to issue such regulations by Acts of Congress.

Circular No. 15 was not a regulation issued by the Secretary of War pursuant to an Act of Congress or an Executive Order. Rather, it was an order issued by a high ranking army officer. It is assumed that it was a lawful order which his subordinates were required to obey. But it is not one which regulated and controlled the relationship between Respondent and the plant guards, who never heard of it. And it is not a proper subject of judicial notice.

The decision of this Court in *Burke* v. *Tregre*, 86 U. S. (19 Wall.) 519, is exactly in point. The Court there was asked to take judicial notice of an order by General Banks, military commander of Louisiana, issued in the exercise of the authority conferred upon him. There, as here, the

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and owned and have since operated entirely in accordance with and under and by virtue of said Army Regulations."

The Exhibits A to H, inclusive, appear on pages 7-71 of the Transcript of Record.

The foregoing allegations were admitted in Paragraph I of the Answer (Transcript of Record, p. 72):

"I.

Admits the allegations contained in paragraphs I, II, III, IV, V and VI of said complaint."

order did not appear in the record, and it did not appear that it had been brought to the attention of the persons affected. There, as here, counsel had simply set it forth at length in a brief. This Court held that it could not take judicial notice of such an order:

> "It is contended by the plaintiff in error that an order of General Banks, in military command at New Orleans, during the period of this controversy, which is set out at length in the brief of counsel, operated as an injunction upon the proceedings of the Marshal, and that, therefore, the sale of the plantation was unauthorized. The answer to this position is that, in the state of the pleadings and evidence, we are not at liberty to pass upon the legality of this order or to determine what effect should be given to it if properly issued. It is not in the record at all, and for aught that appears, was never brought to the notice of either of the courts in Louisiana engaged in the decision of the case.
>
> "It may be that the courts of the country would take judicial notice that Louisiana, at the time mentioned, was in the military occupation of our forces, under General Banks, but we know of no rule of law or practice requiring this, or any other court, to take notice of the various orders issued by a military commander in the exercise of the authority conferred upon him." (86 U. S. 519.)

This Court has made plain in its decisions the limits within which regulations will be judicially noticed. Those limits include only those regulations issued by the officer or agency authorized and directed to issue them by Act of Congress or by Executive Order. The leading case, constantly cited in the decisions, and cited by the Board before the Circuit Court of Appeals, is *Caha* v. *United States*, 152 U. S. 211, 221-222. There this Court said:

> "Another matter is this: The rules and regulations prescribed by the Interior Department in respect to

contests before the Land Office were not formally offered in evidence, and it is claimed that this omission is fatal, and that a verdict should have been instructed for the defendant. But we are of opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which courts of the United States take judicial notice. Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule, deducible from the cases, that wherever, *by the express language of any Act of Congress*, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public in interested, and in respect to which they have a right to participate, and by which they are to be controlled, *the rules and regulations prescribed in pursuance of such authority* become a mass of that body of public records of which the courts take judicial notice." (152 U. S. 211, at 221-222. Emphasis supplied.)

No case will be found in which this Court has judicially noticed orders, rules or regulations issued by someone, not the head of a department, to whom such authority has not been entrusted by statute or Executive Order.

This is a matter of great public importance. The multitude of government agencies and their hordes of officials of all grades and classes put out rules and regulations in a constant flood. Most of them are given no publicity whatever. It is impossible for the citizens to whom they purport to refer even to learn of their existence.

If all these orders are to bind the citizens without being communicated to them; if the citizens are to be assumed to have acted with reference to them without knowing of their existence; if they are to be received by Courts without proof of their issuance or that they were ever applied to the parties litigant; if they are to be noticed at the appellate level to support findings otherwise unsupported

at the trial level where they were unknown;—in such circumstances all vestige of certainty in dealings between citizens and with the Government will be destroyed, and the fundamental rules of administrative procedure will be overthrown.

Congress recognized this serious problem and attempted its solution in the Federal Register Act (49 Stat. 501, 44 USC 305). That Act requires publication of "such documents or classes of documents as the President may determine from time to time have general applicability and legal effect." Documents so published in the Federal Register are entitled to judicial notice. Circular No. 15 was not, and was not required to be, published in the Federal Register.

This Court has not merely taken judicial notice of Circular No. 15. It has also held that Respondent and the plant guards acted in accordance with, and were bound by, that document, without any showing that they had ever heard of it.

It is submitted that this Court erred in taking judicial notice of Circular No. 15 and that it should grant rehearing of the case based upon the transcript of the record.

4. It Would Destroy the Administrative Process to Permit Consideration by an Appellate Court of Matters Not Presented to the Administrative Tribunal.

The essence of the administrative process is that the administrative tribunal hears the evidence, finds the facts, applies the law, and issues an order. That those findings are conclusive if supported by evidence, and the order is final if the tribunal has followed a procedure which is according to law and not arbitrary. The appellate function is limited to a trial of the trial before the Board—if the Board's processes in arriving at the order were according to law, then the order itself is lawful.

This purpose of making the hearing before the Board complete and final is embodied in the Act. It is provided that "The findings of the Board as to the facts, if supported by evidence, shall be conclusive" (Act, Sec. 10(e), *Infra*, pp. 38-39). Thus the Court cannot substitute its judgment in weighing the evidence for that of the Board. It is provided that: "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." (Act. Sec. 10(e), *Infra*, pp. 38-39). Thus the Board's proceedings are made conclusive as to the issues, and respondents are forbidden to attempt to destroy their finality by saving issues for initial presentation to the court. The Circuit Court of Appeals is limited to entering a decree "upon the pleadings, testimony and proceedings set forth" in the transcript certified by the Board.

Thus the purpose of judicial review in the Act is simply to provide "a complete guarantee against arbitrary action by the Board."[3]

The very basis of this administrative process is destroyed if the reviewing court can consider, under the guise of judicial notice, evidence which was not before the Board by judicial notice or otherwise. No longer will the administrative process be complete and final, with judicial review limited to the detection of arbitrary action. Cases can thereafter be decided by the Courts upon evidence judicially noticed which was unknown to the Board. Thereby issues of law and fact never considered by the Board can determine the enforcement or setting aside of the Board's order.

In this particular case the evidence, not considered by the Board, was brought to the notice of the Circuit Court

3. S. Rep. No. 573, 74th Cong. 1st Sess. p. 14. *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376.

of Appeals by the Board itself. But in other cases it could be the respondent which thus shifts the evidence and issues in the Court after the administrative process is finished.

It is submitted that the judicial notice of the reviewing court should be limited to those things noticed by the Board and brought to the attention of respondent when it has an opportunity to rebut them. If matters of importance are discovered after the case reaches the reviewing court, the Act contains ample provisions for the taking of additional evidence before the Board which can then make additional findings and modify its order. Such limitations are necessary to protect the administrative process from abuse and destruction.

5. Circular No. 15 Was Erroneously Used by This Court to Show That the Board's Determination Had a Reasonable Basis in the Evidence Although It Was Not Part of the Evidence.

This Court stated the function of the reviewing courts as follows, in its opinion in this case:

> "As to the merits, it is elementary that the Board has the duty of determining in the first instance who is an employee for purposes of the National Labor Relations Act and that the Board's determination must be accepted by reviewing courts *if it has a reasonable basis in the evidence* and is not inconsistent with the law." (Emphasis supplied.)

Yet when this court came to examine the "evidence" for a "reasonable basis" for the Board's determination that the guards were employees, it devoted most of its examination to Circular No. 15. Circular No. 15 was not known to the Board at the time it made its findings and issued its order. Its determination could not have been based upon Circular No. 15.

Surely the minimum requirement of administrative due process is that the Board's finding and order be based upon evidence known to the board when its determination is made.

II.

Basis of the Judgment of This Court.

In its opinion this Court stated that whether militarized plant guards are *employees for the purposes* of the Act depends upon whether, under the particular circumstances, the militarization transferred to the Army all of the matters which would form the basis for collective bargaining as contemplated by the Act.

This Court said that militarized guards would be employees for the purposes of the Act if

(a) "*the employer may retain power to fix wages, hours and other conditions of work;*" (Emphasis supplied.)

(b) "the need and desirability for collective action on the part of the guards may exist as to matters over which the employer retains control;"

(c) "and a recognition of the statutory rights of the guards may be entirely consistent with their military obligations."

On the other hand this Court said:

"*But if the militarization is such as to transfer to the Army all the matters* over which the employer would normally have control, matters *which would form the basis for collective bargaining as contemplated by the Act, the guards may lose their status as private employees* within the purview of the statute." (Emphasis supplied.)

This Court then reviewed the evidence and found:

"The most important incidents of the employer-employees relationship—*wages, hours and promotion—re-*

mained matters to be determined by respondent rather than by the Army. Respondent could settle those vital matters unilaterally or by agreement with the guards. And the guards were free to negotiate and bargain individually or collectively on these items." (Emphasis supplied.)

This is the heart of the opinion. The judgment of this Court turns upon whether wages, hours and promotion were matters to be determined by Respondent. If, upon the Record, they were not, then this Court's judgment is erroneous.

It is submitted that the evidence shows that hours and promotion were not matters to be determined by Respondent but rather that the power to determine them was in the Army and that their determination was made by the Chief Guard acting as a representative of the Army and not as a representative of Respondent; and that wages were paid by Respondent under circumstances rendering them irrelevant to the "employee" status.

III.

The Determination of Hours and Promotion.

1.—The Board Made No Finding Respecting Hours and Promotion.

In determining from the evidence whether Respondent had power to promote the guards or fix their hours this Court is not hampered by that provision in Section 10(e) of the Act that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive." For the Board did not make any finding about either the power to fix the guards' hours or the power to promote them.

The Board in its Decision makes the following general statement:

> "It is clear, however, that the respondent still retains a sufficient residual measure of control over

the terms and conditions of employment of the guards so that the guards should not be deprived of the rights guaranteed in the Act." (R. 32).

This implies that, even as the Board looked at the evidence, there were some terms and conditions of employment not included within the residue of control by Respondent. This is made apparent from the Board's preceding sentence:

> "It is true that for reasons of national security the respondent may have surrendered to the military authorities many of the attributes of control which it would normally possess over its plant guards." (R. 32).

The Board's specific findings of fact on the locus of control over the terms and conditions of employment are as follows:

> "The record shows that the guards are interviewed for employment by the respondent and not by the United States of America, and are hired by the respondent; that their discharge is ordinarily initiated by the respondent; and that during their employment they are paid by the respondent, at rates set by the respondent and not by the United States of America. According to Chief Guard Henry A. Johnston, a witness called by the respondent in the hearing in the representation case, he is in command of all the guards at one of the plants and works 'very closely' and 'cooperates' with the respondent's representatives. Moreover, Johnston admitted that the respondent could temporarily suspend a guard from duty. Cyrus E. Wood, the respondent's personnel director, who corroborated Johnston's testimony as related above, referred to the guards at the plants involved as the respondent's employees, and further testified that the respondent makes the 'necessary pay roll deductions' before paying them their wages." (R. 31.)

There is no reference to promotion in these findings. This Court thus approaches the question of control over promotions and hours of work unhampered by the statutory premium placed upon administrative findings.

2. This Court's Review of Evidence on Promotion and Hours of Work.

The opinion of this Court in reviewing the evidence refers to working hours and promotion policies only in the following sentence:

> "Respondent delegated to the chief guards its power to determine the guards' working hours and the promotion policies in regard to them."

3. The Evidence Respecting Promotions and Working Hours.

The power to promote is mentioned at only one point in the Record of this case. This was in the cross-examination of Chief of Guards Johnston by Trial Examiner Shroyer. The complete testimony is as follows:

> "Q. These four lieutenants—who made them lieutenants?
>
> A. I made three of them myself. One of them was a lieutenant when I came there. He is a very fine man. His work had been satisfactory and I saw no reason to change it.
>
> Q. Whom did you confer with?
>
> A. No one.
>
> Q. You have final authority to do that?
>
> A. Yes, sir.
>
> Q. Without going either through the personnel office or through the Auxiliary Military Police departments?
>
> A. The only thing I did was after I had decided who would be the next lieutenant and furthered that man, made him a lieutenant, myself, in my office, gave him his gold badge and his authority and posted the notice that he was a lieutenant, and then I went to Personnel and advised them that he was the new lieutenant.

Q. He got his increase in pay?
A. Yes." (R. 82.)

The power to fix the guards' working hours is mentioned at only two points in the Record of this case. These are both in the testimony of Chief of Guards Johnston and are as follows:

"Q. State whether or not the shifts of your guard at your plant rotate or whether they are always the same?

A. The shifts rotate every two weeks.

Q. What do you mean by rotate?

A. I mean that there is entirely—it is my idea, but it seemed a fair way to run it for our particular plant, that they all trade hours every so often and give each other an even break on it, so the 8-4 shift will work from eight until four in the day time for two weeks and then on a Sunday morning, starting at 8 o'clock in the morning, that shift of men will by and large gravitate to the 12-8 shift, upon which they will stay for two weeks, and on completion of that two weeks, they will revert back to the 4-12 shift, that is the idea, although we don't always go to the letter on that.

Q. That is your idea, is it?

A. Yes, sir, that is my idea.

Q. State whether or not the shifts of the regular production and maintenance employees at the main plant of the Atkins company rotate?

A. No, sir; they don't rotate at all. They are frozen shifts.

Q. What you are doing is directly the opposite of what Mr. Wood in the Personnel Department does with the remaining production employees?

A. Yes, sir." (R. 78-79.)

* * * * *

"Q. What are your hours of work?

A. My own hours?

Q. Yes.

A. I work whenever I think—I work whatever

hours I think are advisable to work. They are very scattered and go all around the clock.

Q. You are paid overtime after eight hours in one day?

A. No, sir. I work on a straight salary basis. There is no cognizance at all taken of that when there are any extra hours.

Q. Do you on the average work more than eight hours a day?

A. Well—

Q. How much more?

A. Oh, on an average week after week, it might be ten hours—on an average week after week. Sometimes I work as high as sixteen and twenty and twenty-two, depending on the day and time and circumstances.

Q. But that is left to your own initiative as a military officer?

A. Yes, sir.

Q. Subject nevertheless to any orders you may get from higher authority?

A. Yes, sir." (R. 79-80.)

No reference either to the power to promote or to the power to fix hours of work appears in any of the regulations contained in the Record or in Circular No. 15 cited in this Court's opinion.

4. This Court Erred in Finding Promotions and Hours of Work to Be Matters to Be Determined by Respondent.

It thus appears that there was no evidence that either the power to promote or the power to fix hours of work was vested in Respondent. The sole evidence concerning the power to promote was the testimony of Chief of Guards Johnston that he made the only promotions himself, that he had final authority to make them, and that he consulted no one before doing so. There was no evidence that Chief Johnston acquired this power by delegation from Respondent. On the contrary, as will appear in Part V of this

Argument, it is apparent from the Record that Chief Johnston represented the Army, and not Respondent, in performing this, as well as the other of his functions.

Likewise there was no evidence that Respondent had any power to fix working hours. The only evidence was that Chief Johnston did, in fact, fix the working hours of guards and that he fixed them according to a system contrary to that used by Respondent for its production employees. There was no evidence that Chief Johnston acquired this power by delegation from Respondent. As will be seen from Part V of this Argument Chief Johnston in fixing hours, as in all of his other activities, was acting as a representative of and on behalf of the Army and not on behalf of Respondent.

IV.

The Determination of Wages.

1. The Board's Findings Respecting the Determination of Wages.

The Board made the following findings on the subject of wages:

> "The record shows that" * * * during their employment they are paid by the respondent, at rates set by the respondent and not by the United States of America. * * * Cyrus E. Wood, the respondent's personnel director, * * * testified that the respondent makes the 'necessary pay roll deductions' before paying them their wages." (R. 31.)

2. This Court's Review of Evidence on the Determination of Wages.

The opinion of this Court, in reviewing the evidence and Circular No. 15, refers to wages and their determination as follows:

> "According to Circular No. 15: 'Basically, the militarization of plant guard forces does not change the

existing systems of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant managements."

• • • • •

"Respondent at all times carried the guards on its regular pay rolls, determined their rate of compensation and paid their wages after making appropriate deductions. And since it did not operate on a cost-plus basis, respondent actually bore the cost of the guards' wages." [18]

• • • • •

Footnote 18 to Court's Opinion:

"[18] Respondent argues that it was forced to pay the guards because of the War Department's action in requiring additional plant protection. But respondent was not forced to enter into its war production contracts with the Government. It did so voluntarily and with the understanding that it would comply with any terms and conditions the Government saw fit to impose. One of these conditions was that respondent expand its peacetime guard force of six men to a wartime complement of sixty-four. So far as these additional guards being respondent's employees is concerned, it is no different from a requirement that respondent employ more chemists or other production experts to facilitate execution of the contracts."

3. The Evidence Respecting Determination of Wages

The following appears in the testimony of Mr. Wood, Respondent's Personnel Director, upon cross-examination:

"Q. Mr. Wood, when employees on the guard force are hired, who sets the rate of pay?

A. The rate of pay was established when we filed our schedule October 3, 1942, with the Wage and Hour Division.

Q. The company set that rate of pay at that time?

A. That's right." (R. 93.)

Chief Guard Johnston testified upon cross-examination:

"Q. Are you paid by check?

A. Yes, sir.

Q. Who signs the check?

A. E. C. Atkins and Company.

Q. What do you mean you are hired by the Government when E. C. Atkins and Company pays you?

A. *They pay because the Government makes them pay me.*" (R. 82. Emphasis supplied.)

4. The Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals in its first opinion said:

"The incident most strongly emphasized is that they were paid by respondent. Undoubtedly, this is the most important incident common to the employer-employe relationship. In the instant case, however, it is, when viewed in connection with the attending circumstances, largely minimized if not entirely obliterated. Payment of these guards by respondent, in fact their employment, was a requirement imposed by the government as a prerequisite to respondent's right to engage in the manufacture of war material. It had no option to pay or not pay; neither did it have any option to employ or not employ. Chief Johnston, when asked why the guards were paid by respondent when their orders were received from the military authorities, stated an incontrovertible fact: 'They pay because the government makes them pay.' It must be assumed, so we think, that respondent was reimbursed by the government for all costs incurred in the manufacture of war material, including that of compensation paid to the guards. In reality, under such circumstances, as bearing upon the employer-employe relationship, we are of the view that it makes no difference whether they were paid by respondent or by the government.

"It is also well to keep in mind that this guard force was born of the exigencies of war. None of them (with the exception of the four original watchmen) had theretofore been employed at respondent's plant. They were employed at the command of the government and the purpose of their employment was, as stated in the

President's proclamation, 'to protect from injury or destruction national-defense material, national-defense premises, and national-defense utilities,' or, as stated in the agreement which the plant guard was required to sign with the government, 'to protect war material, war premises, and war utilities against all enemies, foreign and domestic.' In 'Plant Protection Data Binder' dated June 7, 1943, the mission of a guard force is stated to be twofold: (a) 'to provide interior and exterior protection of the plant against sabotage and espionage and natural hazards,' and (b) 'to serve with the Army in providing the protection to the plant and its environs in emergency situations.' Again, it is stated in this Binder, 'The auxiliary military police are supplementing the Army of the United States in a vital task of protecting war material and war production facilities.' It appears certain not only that they were employed at the command of the government but that the services rendered by them were for the benefit of the government and the war effort. Any benefit accruing to respondent from their services was purely incidental to the primary purpose of their employment. Reliance upon payment under such circumstances is to embrace form and to ignore the realities of the situation." (R. 354-355.)

5. This Court Erred in Holding That Wage Determination Make the Guards Employees Under the Act.

The requirement of the War Department that Respondent co-operate in the establishment at its plants of a force of Auxiliary Military Police is definitely "different from a requirement that respondent employ more chemists or other production experts to facilitate execution of the contracts." (This Court's Opinion, footnote 18.)

If those chemists or other production experts were employed by Respondent at its own selection, under its control, and upon terms and conditions of employment determined by Respondent, they would of course be Respond-

ent's employees. The fact that they were employed to fill a war contract would not be relevant.

But if those chemists were selected by the Army and dismissed by it; if their terms and conditions of employment were set by the Army and not by Respondent; if they were directed by a Chief Chemist who was directed by and answerable to the Army and not to Respondent; if their chief function was the performance of a military purpose such as protecting war plants or material against espionage and sabotage; if the chemists were expressly subjected to court martial for purely military offenses such as desertion and compelling a commander to surrender (Resp. Ex. 4, R. 108; Article 58, R. 138 and Article 76, R. 143); and if the chemists were required to wear distinctive insignia so that they "will be recognized as legitimate troops" (Resp. Ex. 4, R. 110)—in such event it would be relevant to explain payment by Respondent by stating Respondent was forced to pay under the contract.

It is true that

> "respondent was not forced to enter into its war production contracts with the Government. It did so voluntarily and with the understanding that it would comply with any terms and conditions the Government saw fit to impose." (This Court's Opinion, footnote 18.)

But suppose the Army had stationed sixty-four men who were clearly soldiers at Respondent's plant, and required Respondent, as a condition of its contract, to pay them? Would those soldiers become "employees" under the Act? Would Respondent be forbidden to say "we paid because we were forced to pay"?

Of course, it may be answered that it would be illegal to require Respondent to pay soldiers. But that enhances the analogy. The Attorney General of the United States

has given the opinion that the whole system of militarizing plant guards was illegal:

> "An examination of the basic authority pursuant to which the 'Civilian Auxiliary Military Police' was organized, including Executive Order 8972, the various statutes providing for the composition of the armies of the United States, and the Articles of War, *leads me to conclude that there is no legal basis for the militarization of these plant protective forces.*" (Board's Brief, Appendix D, p. 164.) (Emphasis supplied.)

It is submitted that the payment of wages by Respondent does not afford a basis for holding these guards to be employees of Respondent under the Act.

V.

The Chief Guards Represented the Army, Not Respondent.

1. The Importance of This Issue.

It is vital to this case to know whom the Chief Guards represented. When a Chief Guard acted, was it the act of Respondent, or the act of the Army? Did the Chief Guards exercise authority delegated by Respondent, which Respondent could exercise? Or did they exercise authority given to them by the Army which only the Army, and not Respondent, could exercise?

This Court found in its Opinion that the Chief Guards represented Respondent in directing the guards and in setting their hours of work and promotion policies. That finding is essential to this Court's Opinion.

It is submitted that the Chief Guards were not controlled by Respondent in any way; that they were controlled by the Army; that they received no delegation of powers from Respondent; that they did not purport to act for Re-

spondent; and that Respondent did not purport to have, delegate or exercise the powers which were exercised by the Chief Guards.

2. There Was No Finding by the Board That the Chief Guards Represented Respondent.

The only reference to either Chief Guard in the Board's Decision was the following reference to Chief Johnston:

> "According to Chief Guard Henry A. Johnston, a witness called by the respondent in the hearing in the representation case, he is in command of all the guards at one of the plants and works 'very closely' and 'cooperates' with the respondent's representatives. Moreover, Johnston admitted that the respondent could temporarily suspend a guard from duty." (R. 31.)

Therefore this Court is not limited by any finding on the subject, and must look to the Record for the status of the Chief Guards.

3. The Chief Guards Were Enrolled by the Army.

There is no dispute that Chief Johnston was himself a member of the Auxiliary Military Police. He applied for enrollment like anyone else at the Respondent's personnel office, and "was given to understand that then when I filled the application that it would not be effective without the approval of the United States Government." (R. 68) He was investigated by the Military Authorities (R. 71) and not by Respondent, and was sworn in as a Military Policeman (R. 69). The Army then issued to him a "Plant Guard Identification Card" (R. 69) which appears in facsimile as Respondent's Exhibit 3 (R. 104).

He was required to sign an Agreement with the United

States of America (Resp. Ex. 2, R. 103-104), after which he was a representative of the Government in the plant:

> "A. Well, that exhibit there is signed by the guard, the member of the Auxiliary Military Police. He is not yet a member. He signed that agreement and oath with the United States and that in turn is immediately forwarded to the Continuous Security District Office and then this pass is issued upon receipt after thorough checking has been given. It's issued on that contract. When you receive this pass then you know that you have been *accepted by the Government as one of their representatives in the plant.*" (Emphasis supplied.) (R. 70.)

He received a Certificate of Enrollment in the Auxiliary Military Police of the Army of the United States:

> "UNITED STATES OF AMERICA.
> Auxiliary Military Police.
> Army of the United States.
> Certificate of Enrollment.
>
> This is to Certify that Henry Adams Johnston has been voluntarily and duly enrolled as an Auxiliary to the Military Police with the rank of _____, for service with the Army of the United States at E. C. Atkins & Company, Indianapolis, Indiana, and is subject to Military Law for the duration of the War or until the earlier official termination by the War Department of his services as an Auxiliary to the Military Police.
>
> For the Commanding General, Fifth Service Command:
> Dated 29 June, 1943.
>
> A. C. RASMUSSEN,
> A. C. RASMUSSEN,
> *Lt. Col., Ord. Dept., Chief, Continuous Security District Office, Cincinnati, Ohio.*

Official:

B. R. WETENHALL,

B. R. WETENHALL,

Capt. C. M. P., District Plant Guard Officer, Cont. Secty. Dist. Off., Cincinnati, O."

(Resp. Ex. 6, R. 115-116)

4. The Chief Guards Received All Orders from the Army and None from Respondent.

Chief Johnston received *all* of his orders from the Army, and none of them from Respondent. He received three "general orders."

"Q. Now, how do you receive the general orders for your duties, from what source?

A. General orders are received from Capt. Wetenhall of the Fifth Service Command, Cincinnati."

• • • • •

"Q. I now show you Employer's Exhibits Nos. 10, 11, 12 and ask you what they are.

(Whereupon, the documents above referred to were marked for identification as 'Employer's Exhibits 10, 11, and 12.')

A. These are general orders from Capt. Wetenhall of the Fifth Service Command District Plant Guard Officer, who is over all the Auxiliary Military Police in this District. These three orders take up different subjects and they are to be followed." (R. 73.) He passed these orders on to this subordinates by having them photostated and enlarged four times. (R. 73.)

The Chief of Guards was instructed to enforce orders by the Army. He reported all violations of orders to the Army, and not to Respondent:

"Q. Referring to Employer's Exhibit No. 11, I call your attention to the third General Order 'to report all violations of orders I am instructed to enforce.'

A. That's right.

Q. To whom do you report such violations? What do you do under that order?

A. I would report any violation, any serious violation, to Capt. Wetenhall of Cincinnati." (R. 75.)

He took his orders from the Army and not from Respondent or Respondent's officials:

"Q. And who instructs you to enforce orders?

A. It would be the government.

Q. Do you take any orders from Mr. Wood who sits here in the court room and is the personnel director of E. C. Atkins and Company?

A. Yes, naturally; I work very closely with Mr. Wood, as he is personnel director of the plant and there can be much more efficient guarding of the plant and operation of the plant if we do work closely. I have never taken an order as such from him.

Q. You try to cooperate?

A. I try to cooperate to the best of my ability and he does the same for me." (R. 75.)

* * * * * *

Johnston received all his instructions, and made all of his reports, orally and by correspondence with Captain Wetenhall and Lieutenant Scanlon of the Army. In addition to the testimony already quoted herein, there was further testimony by Johnston on that subject:

"Q. Do you have the right to recommend them for promotion or discharge? Do you do that?

A. I recommend a man for discharge but I don't discharge him myself.

Q. You have the right to recommend him for discharge?

A. Yes, sir.

Trial Examiner Shroyer: While on the subject, to whom do you recommend?

The Witness: To Capt. Wetenhall, Cincinnati, who does the discharging." (R. 81.)

"Q. In connection with your administrative duties, do you carry on any correspondence with Mr. Wood or any officials of the plant?

A. No, sir.

Q. Do you carry on any correspondence with the Cincinnati office of the Military?

A. Yes, sir.

Q. With Captain Wetenhall?

A. Wetenhall's office.

Q. Do you have before you there the file of that correspondence?

A. Yes, sir; I think it is here.

Q. And that file is about one inch thick now?

A. Yes, sir.

Q. And contains onion skin carbon copies of your letters to Wetenhall and original letters from Wetenhall to you?

A. That's right.

Q. About how often do you write him affecting your duties, responsibilities, and requests for instructions from him?

A. On an average probably of twice a week, is all.

Q. You ask him both for general orders and for specific instructions?

A. Yes; or I might on a small case instead of writing Capt. Wetenhall, I might talk it over with his assistant, Lt. Scanlon in the City of Indianapolis, who lives here.

Q. That wouldn't require correspondence?

A. No.

Q. You could conduct by telephone, too?

A. Yes.

Q. If a man is drunk on duty have you the right to discharge that man?

A. I couldn't discharge him legally; no, sir.

Q. Could you suspend him?

A. I would merely suspend him from duty as of the minute I saw him in that condition.

Q. What would be your next step?

A. To sit down and write Capt. Wetenhall a letter and I would recommend his discharge from the Military Police." (R. 83-84.)

5. Respondent Could Not Give Orders to the Chief Guards.

Chief Guard Johnston testified plainly that Respondent had no power to give him orders:

"Q. And who instructs you to enforce orders?

A. It would be the government.

Q. Do you take any orders from Mr. Wood who sits here in the court room and is the personnel director of E. C. Atkins and Company?

A. Yes, naturally; I work very closely with Mr. Wood, as he is personnel director of the plant and there can be much more efficient guarding of the plant and operation of the plant if we do work closely. I have never taken an order as such from him.

Q. You try to cooperate?

A. I try to cooperate to the best of my ability and he does the same for me." (R. 75.)

* * * * *

"Q. Do any of the Military Police under your command take any orders from any officer, director, or agent of the Atkins company as such?

A. No; they wouldn't take any orders. Just like myself, they would cooperate in any way they could, but they would only—

Q. Suppose such cooperation involved deviation from such specific order which you had to give. Would they follow your specific order or would they cooperate?

A. They would—that would be their orders—to follow mine; yes, sir." (R. 78.)

He repeated this under cross-examination:

"Q. Suppose Mr. Atkins came out and gave you an order. Would you obey that?

A. I never got an order.

Q. If you did, would you obey that order?

A. Well, I wouldn't consider it an order, in the first place. If I could oblige him in any way, without violating federal orders, I would do my best to cooperate with him, but I wouldn't have an order from him in the first place." (R. 82.)

This Court in its opinion states that Respondent gave no orders to the guards; and refers to the cooperation between Respondent and the Chief Guards as though it covered a relationship of control:

> "Respondent did not attempt to give orders to the guards, merely making suggestions to the chief guards. The latter worked in close cooperation with respondent's personnel manager and no friction developed."

This apparently refers to the testimony of Chief Johnston that he and Personnel Director Wood "work very closely" together and "cooperate." It is submitted that this is not an indication of control of the Chief Guard by Respondent. It is hoped that all war contractors "worked very closely" and "cooperated" with the Army. That raises no inference that the Army became an agent or subordinate of the war contractors.

Respondent's Personnel Director Wood denied any authority over the Chief Guards:

> "Q. Is his (Chief Johnston's) testimony with respect to your being permitted to make recommendations but not being permitted to give orders respecting the duties of the Auxiliary Military Police correct?
>
> A. It is correct.
>
> Q. You have been able to work in cooperation with the Auxiliary Military Police?
>
> A. We have; yes.
>
> Q. Have you ever attempted to exercise any of the authority which you are prohibited from exercising by military orders over any of these sixty-four members of the Military Police?
>
> A. Not to my knowledge.
>
> Q. Or has any foreman or hiring officer or director of Atkins and Company attempted to exercise such a right?
>
> A. No.
>
> Q. Instructions have been promulgated, have they not, throughout the entire plant that the Military Po-

lice are the business and affairs of the military authorities?

A. That's correct. It is understood, sir." (R. 89-90.)

* * * * * *

"Q. What would you do, Mr. Witness, if one of the Auxiliary Military Police came to your and protested to any action of a disciplinary nature by Chief Johnston?

A. Report that to the proper authorities, in this case to Col. Rasmussen in Cincinnati. He is the man that my office deals with when necessary.

Q. You would take no jurisdiction yourself?

A. No; not without instructions from Col. Rasmussen.

Q. You do, whenever matters of discipline are taken up in your plant get confirmation of any instructions which Col. Rasmussen or Capt. Wetenhall sent to Chief Johnston or to Chief Hann, is that right?

A. That's right." (R. 90.)

6. Respondent Did Not Delegate Any Power to the Chief Guards.

The Opinion of this Court contains the following statement concerning the origin of the Chief Guards' powers:

> "Respondent delegated to the chief guards its power to determine the guards' working hours and the promotion policies in regard to them."

As has been set forth in Part III (*supra*, p. 14) there is no evidence in the Record of the possession by Respondent of the power to fix promotion policies or hours of work. Likewise, there is no evidence of any kind of any act of delegation by Respondent to the Chief Guards of such powers. In view of the direct testimony that the Chief Guards took no orders from Respondent; and that they were completely controlled by the Army; it must be found that these powers came to the Chief Guards by delegation from the Army.

7. The Chief Guards Could Not Have Represented Respondent.

From the foregoing quotations from the Record, it is plain that Respondent did not intend to delegate any authority to the Chief Guards or to be represented by them. It is also plair that the Chief Guards thought that they represented the Army and that the Army did in fact give them orders and authority.

The Chief Guards could not be the agents and representatives of Respondent contrary to the intention and understanding of all concerned.

Conclusion.

It is submitted that rehearing should be granted and the decision of the Circuit Court of Appeals from the Seventh Circuit affirmed.

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CERTIFICATE OF COUNSEL.

The undersigned, FREDERIC D. ANDERSON, one of the attorneys for E. C. ATKINSON AND COMPANY, the Respondent in the above-entitled case, hereby certifies that the annexed "Petition for Rehearing of Respondent, E. C. Atkins and Company," is presented by him to the Supreme Court of the United States in good faith and not for delay.

Dated at Indianapolis, Indiana, this 11th day of June, 1947.

FREDERIC D. ANDERSON.

APPENDIX A.

PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT PERTINENT TO THE PETITION FOR REHEARING OF THE RESPONDENT.

NOTE: Emphasis, **in bold face type**, is that of counsel.

RIGHTS OF EMPLOYEES.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS.

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right

to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES.

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention

that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) **The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board.** Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If **upon all the testimony taken** the Board shall be of the opinion that any person named in the complaint **has engaged in or is engaging in any such unfair labor practice, then** the Board shall state its findings of fact and shall issue and cause to be served on such person an **order** requiring such person to cease and desist **from such unfair labor practice,** and to take such affirmative action, including reinstatement of employees with or without back pay, as

will effectuate the policies of this Act. **Such order** may further require such person to make reports from time to time showing the extent to which it has complied with the order. If, **upon all the testimony taken**, the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, **then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.**

(d) **Until a transcript of the record in a case shall have been filed in a court**, as hereinafter provided, **the Board may** at any time, upon reasonable notice and in such manner as it shall deem proper, **modify or set aside, in whole or in part, any finding or order made or issued by it.**

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question **occurred** or wherein such person resides or transacts business, for the enforcement of **such order** and for appropriate temporary relief or restraining order, and shall certify and file in the court **a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board.** Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and **to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript** a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or

in part the order of the Board. **No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objections shall be excused because of extraordinary circumstances.** The findings of the Board as to the facts, **if supported by evidence**, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a **final order** of the Board granting or denying in whole or in part the relief sought may obtain a review of **such order** in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia,

by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court **a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board.** Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (c), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, **if supported by evidence,** shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C.; Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

APPENDIX B.

SUPREME COURT OF THE UNITED STATES.

No. 419.—OCTOBER TERM, 1946.

National Labor Relations Board, Petitioner, v. E. C. Atkins and Company. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 19, 1947.]

MR. JUSTICE MURPHY delivered the opinion of the Court.

The problem posed by this case is whether private plant guards, who are required to be civilian auxiliaries to the military police of the United States Army, are employees within the meaning of § 2 (3) of the National Labor Relations Act, 29 U. S. C. § 152 (3).

At all material times, the respondent corporation was engaged in the manufacture of saws, tools and armor plate. It employed more than 1,200 production and maintenance employees at its two plants at Indianapolis, Indiana. Before it began to produce armor plate for defense and war purposes, respondent employed about six watchmen or guards. When it entered upon war production, however, the War Department required that an auxiliary military police force of sixty-four members be established to guard the plants.

In 1943, after the necessary additional guards had been

recruited, a union[1] petitioned the National Labor Relations Board for investigation and certification of representatives pursuant to § 9 (c) of the Act. It was alleged that the union represented the sixty-four plant guards employed by respondent at its two plants. The respondent moved to dismiss the petition on the ground that it was not the employer of the guards within the meaning of § 2 (2) and that the guards were not employees as defined by § 2 (3). A hearing was thereupon held and evidence concerning the status of the guards was introduced.

On October 19, 1943, the Board concluded from the evidence thus submitted that these plant guards were employees within the meaning of § 2 (3) despite their status as civilian auxiliaries to the military police. 52 N. L. R. B. 1470. It held that all the plant guards at respondent's two plants, excluding the chief guards, lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constituted a unit appropriate for collective bargaining. An election was therefore directed to be held, which resulted in the union in question being chosen as bargaining representative. The union was certified by the Board as the exclusive representative of the plant guards.

Subsequently, the union filed charges that the respondent had refused to bargain collectively. A complaint was issued by the Board, followed by a hearing at which evidence regarding that refusal was introduced. The Board,

[1] Local 1683 of the International Association of Machinists, District 90. This union did not represent any of the maintenance or production employees in respondent's plants, but it did admit to membership plant protection employees of other employers as well as those of respondent.

on May 30, 1944, issued its decision in which it concluded that the guards were employees of respondent and that the latter had committed unfair labor practices in refusing to bargain with the union. 56 N. L. R. B. 1056.

The Board accordingly issued an order requiring respondent to cease and desist from refusing to bargain collectively with the union, and commanding it to bargain with the union, upon request, in respect to rates of pay, wages, hours of employment and other conditions of employment. The Seventh Circuit Court of Appeals declined to enforce the Board's order, holding (1) that the guards were not employees of the respondent within the meaning of § 2 (3) of the Act since they were militarized, and (2) that even if the militarized guards were to be considered as employees of respondent, enforcement of the Board's order should not be allowed because to do so would be or would likely be inimical to the public welfare. 147 F. 2d 730.

In filing a petition in this Court for a writ of certiorari, the Board noted that the guard forces at respondent's plants had been demilitarized early in 1944, but urged that the case was not thereby rendered moot. We granted certiorari, vacated the judgment below and remanded the case to the Circuit Court of Appeals "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof on the Board's order." 325 U. S. 838.

The Board and the respondent entered into a stipulation relative to the dates and circumstances of the demilitarization of the guards. The stipulation noted that most of the guards had been released from service and that only eleven of them had been retained as watchmen by respondent as of February 23, 1946; and those eleven had been

"sworn in as Deputy Policemen by the City of Indianapolis." The Board then filed a motion in the Circuit Court of Appeals for a decree enforcing its order. This motion was denied and the prior holding was reaffirmed, the court stating that the demilitarization was irrelevant to the issue of whether the plant guards were employees at the time when the respondent refused to bargain with the union. 155 F. 2d 567. The importance of the problem raised by the case, together with a conflict over the answer to this problem between the court below and the Sixth Circuit Court of Appeals, *Labor Board* v. *Jones & Laughlin Steel Corp.*, 146 F. 2d 718, prompted us to grant a further review of the case.

We agree with the Circuit Court of Appeals that the demilitarization of the guards did not render the case moot and that it had no effect upon the prime issue in the case. The Board's order was based upon a holding that the respondent committed an unfair labor practice by refusing to recognize and bargain with the union selected by the militarized guards. And that refusal occurred at a time when the guards were still militarized. A determination that the respondent had a statutory duty to bargain with the union at that time is therefore essential to the validity of the Board's order. The fact that the guards were subsequently demilitarized did not affect their status as employees at this crucial juncture; nor did it relieve respondent of any duty to bargain that it might otherwise have had at that point.

The Board's order, moreover, was a continuing direction to bargain collectively with the union designated by the guards. Demilitarization has not dispensed with whatever duty respondent may have now or in the future to comply with that order. If the guards were employees of respondent entitled to the benefits of the Act during the

period of militarization, *a fortiori* they are employees now that all connections with the Army have been severed; and their statutory rights continue to be entitled to full respect. Respondent's guard force still remains in existence, although considerably reduced in size, and the union presumably continues to be the representative of the guards. Under such circumstances, the case is not moot. *Labor Board* v. *Greyhound Lines*, 303 U. S. 261, 271; *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, 334. See also *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257, 260.

As to the merits, it is elementary that the Board has the duty of determining in the first instance who is an employee for purposes of the National Labor Relations Act and that the Board's determination must be accepted by reviewing courts if it has a reasonable basis in the evidence and is not inconsistent with the law. *Labor Board* v. *Hearst Publications*, 322 U. S. 111. Realizing that labor disputes and industrial strife are not confined to those who fall within ordinary legal classifications, Congress has not attempted to spell out a detailed or rigid definition of an employee or of an employer. The relevant portion of § 2 (3) simply provides that "The term 'employee' shall include any employee, . . ." In contrast, § 2 (2) states that "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, . . ." As we recognized in the *Hearst* case, the terms "employee" and "employer" in this statute carry with them more than the technical and traditional common law definitions. They also draw substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life.

And so the Board, in performing its delegated function of defining and applying these terms, must bring to its

task an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by this statute. This does not mean that it should disregard the technical and traditional concepts of "employee" and "employer." But it is not confined to those concepts. It is free to take account of the more relevant economic and statutory considerations. And a determination by the Board based in whole or in part upon those considerations is entitled to great respect by a reviewing court, due to the Board's familiarity with the problems and its experience in the administration of the Act.

Laying aside for the moment the matter of militarization, we cannot say in this case that the Board would be legally unjustified in holding that the rank and file plant guards are employees within the meaning of the Act. They bear essentially the same relation to management as maintenance and production employees. In fact, they are indistinguishable from ordinary watchmen, gatemen, patrolmen, firemen and guards—persons who have universally been regarded and treated as employees for purposes of union membership and employee benefits. They perform such duties as inspecting persons, packages and vehicles, carrying cash to various parts of the plant, and generally surveying the premises to detect fires, suspicious circumstances and sabotage. Moreover, the guards in question are not supervisors; they possess no power to affect the working conditions of other employees. Without collective bargaining, they are subject to the unilateral determination by the employer of their wages, hours, seniority, tenure and other conditions of work. Individually, they suffer from inequality of bargaining power and their need for collective action parallels that of other employees. From any economic or statutory standpoint, the Board would be warranted in treating them as employees. Even under conventional standards, they are controlled by man-

agement to an extent sufficient to justify designating them as employees.

Nor can we say, as a matter of law, that permitting plant guards to be considered as employees entitled to the benefits of the Act would make them any less loyal to their employer in carrying out their designated tasks. In guarding the plant and personnel against physical danger, they represent the management's legitimate interest in plant protection. But that function is not necessarily inconsistent with organizing and bargaining with the employer on matters affecting their own wages, hours and working conditions. They do not lose the right to serve themselves in these respects merely because in other respects they represent a separate and independent interest of management. As in the case of foremen, we see no basis in the Act whatever for denying plant guards the benefits of the statute when they take collective action to protect their collective interests. *Packard Motor Car Co. v. Labor Board*, 330 U. S.—.

We cannot assume, moreover, that labor organizations will make demands upon plant guard members or extract concessions from employers so as to decrease the loyalty and efficiency of the guards in the performance of their obligations to the employers. There is always that possibility, but it does not qualify as a legal basis for taking away from the guards all their statutory rights. In other words, unionism and collective bargaining are capable of adjustments to accommodate the special functions of plant guards.

The crucial problem in this case, however, is whether the militarization of the plant guards changed their status as employees as a matter of law so as to prohibit the Board from extending to them the benefits of the Act which they would otherwise have. The short answer to that problem

is that militarization as such does not necessarily change the status of plant guards. It may or may not bring about a change, depending upon the particular circumstances. The militarization may be a qualified one; the employer may retain power to fix wages, hours and other conditions of work; the need and desirability for collective action on the part of the guards may exist as to the matters over which the employer retains control; and a recognition of the statutory rights of the guards may be entirely consistent with their military obligations. If that is the case, the guards remain employees for purposes of the Act. But if the militarization is such as to transfer to the Army all the matters over which the employer would normally have control, matters which would form the basis for collective bargaining as contemplated by the Act, the guards may lose their status as private employees within the purview of the statute.

The Board's determination that the militarization of the guards in respondent's plants was of a type that did not alter their status as employees under the Act must therefore be tested by the applicable War Department regulations and by the evidence introduced at the hearing before the Board. If such a result is consistent with the regulations and has a reasonable basis in the other evidence, the Board's order must be sustained.

The plant guards in this case were enrolled as civilian auxiliaries to the military police under War Department regulations issued pursuant to Executive Order No. 8972, dated December 12, 1941. That order authorized the Secretary of War to establish and maintain military guards and patrols, and to take other appropriate measures, to protect certain strategic premises, materials and utilities from injury and destruction. The Secretary of War accordingly directed the military organization of plant guard forces as auxiliary military police at plants important to

the prosecution of the war, the directive to that effect being issued by the Adjutant General on July 2, 1942. Supplementary regulations were contained in Circular No. 15, issued on March 17, 1943, by Headquarters, Army Service Forces.[2]

As stated by these regulations, the purpose of the military organization of the plant guards was "to increase the authority, efficiency, and responsibility of guard forces at plants important to the prosecution of the war, and through military training to provide auxiliary forces throughout the United States to supplement the Army in wartime emergency situations."[3] It was made clear, however, that plant managements were not relieved of their responsibility "for providing adequate protection at all times against all hazards."[4] In other words, employers who wished to obtain government contracts for the production of war materials were required to provide "adequate protection" for their plants where the material was to be produced; if the existing plant protection forces were inadequate, additional guards were to be recruited by the employers. But all the original and additional guards were to be enrolled as civilian auxiliaries to the military police.

The military authorities reserved the right to veto the hiring or firing of any plant guard where such action by the employer might impair the efficiency of the guard force.[5] And the military plant guard officers were authorized to take appropriate action "through the plant

[2] Circular No. 15 was not introduced into evidence in the proceeding before the Board. But it was issued by military authorities pursuant to the power vested in the Secretary of War by Executive Order No. 8972 and we may take judicial notice of it. *Standard Oil Co. v. Johnson*, 316 U. S. 481, 483-484.

[3] Circular No. 15, par. 1a.

[4] *Id.* par. 1b.

[5] *Id.* par. 6b (2).

management" to correct conditions which might result in "defective or inadequate performance by the guard forces of its ordinary protective duties."[6]

The functions of these civilian auxiliaries to the military police were stated to be twofold: "(1) To provide internal and external protection of the plant against sabotage, espionage, and natural hazards. (2) To serve with the Army in providing protection to the plant and its environs in emergency situations."[7] They were subject to call for military service even where emergencies arose at places other than the plants where they normally worked. To these ends, military plant guard officers were authorized to exercise direct control over the guard forces "only in matters relating to military instruction and duties as Auxiliary Military Police."[8] But such orders "will be issued only after consultation with and, if possible, concurrence by the plant management. * * * Control, therefore, will be exercised as heretofore through the plant management except at drill and except in emergency situations. Although the plant guard officers will be in command at all times, *they will not supplant the civilian guard officers*, and unless expediency demands otherwise will exercise their authority through the chain of command established by the plant management."[9] The regulations also provided that the military drill of the guard forces should not exceed one hour per week "except with the approval of the plant management."[10]

As to the employer's relations with the guard force, the regulations were explicit in recognizing that those relations remained essentially the same as if there were no

[6] *Id.* par. 1b.
[7] *Id.* par. 2a.
[8] *Id.* par. 5a (2).
[9] *Id.* pars. 5c (2) and 6a (1).
[10] *Id.* par. 7g (1).

militarization. According to Circular No. 15: "Basically, the militarization of plant guard forces does not change the existing systems of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant managements. Guards in the employ of a private employer may, as heretofore, be dismissed by that employer."[11] A veto power over employment and dismissal, of course, was retained by the military. It was further provided: "The status of the employer in respect to the employee benefits for the guard force is not changed. For example, social security, workmen's compensation, and employer's liability provisions remain unaffected."[12] And the employer was expected to train the guard forces in their ordinary protective duties and was required to furnish them with uniforms and weapons.[13]

The right of the plant guards to bargain collectively was recognized by Circular No. 15, paragraph 6h (2) of which provided: "Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police. In view of recent decisions by the National Labor Relations Board (see *In re Lord Mfg. Co. & United Rubber Workers of America*, CIO, Case No. R—4826, February 1943) [*Lord Manufacturing Co.*, 47 N. L. R. B. 1032], the Auxiliary Military Police should be represented in collective bargaining with the management by a bargaining unit other than that composed of the production and maintenance workers, although both bargaining units may be affiliated with the same labor organization. Where the guards are not now

[11] *Id.* par. 6b (1).

[12] *Id.* par. 6f.

[13] The guards were required to salute Army officers and had the right to arrest anyone in the plants. They carried identification cards issued by the War Department and wore arm bands on which appeared the words "Auxiliary Military Police." *Id.* par. 7.

included in the same bargaining unit, this is mandatory; where the guards are included in such unit, serious consideration will be given to effect a change to conform to the foregoing policies."[13] Provision was also made that collective bargaining agreements covering plant guards who were civilian auxiliaries should include a clause recognizing that nothing in the collective bargaining relationship should interfere with the duties imposed upon the guards as auxiliary military police.[14]

The guards were required to sign agreements with the United States.[15] Each agreement stated that the individual, who had been or was about to be employed by the particular company as a guard at its plant, agreed that he would support and defend the Constitution, bear true faith and allegiance to the Constitution, and faithfully discharge his duties as a civilian auxiliary to the military police. He also acknowledged in this agreement that appropriate Articles of War had been read and explained to him and that he was subject to military law during his employment. The applicable regulations then provided that he could be court martialed where no other effective form of punishment would be effective. But "Unlike the court-martial punishment of a person in military service, a court martial cannot punish a member of the Auxiliary Military Police by reduction in military grade or by forfeiture of pay and allowances. Analogous punishments might be imposed, such as reduction in grade in the guard organization or temporary suspension from duty. A fine, as distinguished from forfeiture, is regarded as an appropriate form of punishment."[16] In all other respects, the guards remained subject to the civil courts.

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[13] *Id.* par. 6h (1).

[14] *Id.* par. 6h (1).

[15] If a guard refused to sign this agreement, he might be, but need not be, temporarily retained with the understanding that he would be dismissed as soon as he could be replaced, and in any event within a reasonable time. *Id.* par. 5b (1).

[16] *Id.* par. 8d.

The evidence and testimony submitted to the Board confirmed the fact that the plant guards in respondent's two plants were militarized in accordance with the foregoing regulations. The guards at each plant were under the direct supervision of a chief guard and several lieutenants—all of whom were civilians recruited by the respondent like the rank and file guards. The military superior of the chief guards was the District Plant Guard Officer stationed at the Continuous Security District Office of the War Department, Cincinnati, Ohio, an officer who also had charge of guard forces at other plants in the district. A general directive issued by this office repeated many of the provisions of Circular No. 15.[17] It also provided that orders and regulations for the auxiliary military police would be issued in the name of the Chief of the District "after plant management has indicated its concurrence by signing the guard order in the lower left hand corner." But the only guard orders received by the chief guards at respondent's plants were three general ones signed by the District Plant Guard Officer, orders that were applicable to all militarized guards in the district. All the specific orders that were ever issued emanated from the chief guards. About the only direct contact between the military authorities and these guards occurred during the weekly drill period.

Respondent recruited the necessary additional guards through its ordinary employment channels and it had the power to initiate dismissals from the force. Such actions, however, were subject to the approval of the military. Respondent at all times carried the guards on its regular pay rolls, determined their rate of compensation and paid their wages after making appropriate deductions. And since it did not operate on a cost-plus basis, respondent

[17] This directive, however, omitted par. 6h (2) of Circular No. 15, dealing with the right of guards to bargain collectively.

actually bore the cost of the guards' wages.[18] Respondent did not attempt to give orders to the guards, merely making suggestions to the chief guards. The latter worked in close cooperation with respondent's personnel manager and no friction developed. Respondent delegated to the chief guards its power to determine the guards' working hours and the promotion policies in regard to them. Finally, respondent maintained its liability as to the guards on matters of social security and workmen's compensation and was obliged to obey all minimum wage and maximum hour requirements.

From the foregoing, an ample basis is evident to support the Board's determination that militarization did not destroy the employee status of the guards in respondent's plants. The War Department regulations and the actual practice in these plants were based upon the explicit assumption that the guards were the private employees of respondent rather than employees or soldiers of the United States. The regulations made it unmistakable that the normal, private employer-employee relationship was to remain substantially intact. Especially clear was the fact that the right of the guards to join unions and to bargain collectively was to be respected. The military authorities took over from respondent only those attributes of control which were necessary to effectuate the rather limited military program, many aspects of that transferred power

[18] Respondent argues that it was forced to pay the guards because of the War Department's action in requiring additional plant protection. But respondent was not forced to enter into its war production contracts with the Government. It did so voluntarily and with the understanding that it would comply with any terms and conditions the Government saw fit to impose. One of these conditions was that respondent expand its peacetime guard force of six men to a wartime complement of sixty-four. So far as these additional guards being respondent's employees is concerned, it is no different from a requirement that respondent employ more chemists or other production experts to facilitate execution of the contracts.

being exercisable by the Army only in the gravest emergencies.

We cannot say that the Board was without warrant in law or in fact in concluding that respondent retained "a sufficient residual measure of control over the terms and conditions of employment of the guards" so that they might fairly be described as employees of respondent.[19] The most important incidents of the employer-employees relationship—wages, hours and promotion—remained matters to be determined by respondent rather than by the Army. Respondent could settle those vital matters unilaterally or by agreement with the guards. And the guards were free to negotiate and bargain individually or collectively on these items. It is precisely such a situation to which the National Labor Relations Act is applicable. It is a situation where collective bargaining may be appropriate and where statutory objectives may be achieved despite the limitations imposed by militarization. Under such circumstances, the Board may properly find that an employee status exists for purposes of the Act.

In this setting, it matters not that respondent was deprived of some of the usual powers of an employer, such as the absolute power to hire and fire the guards and the absolute power to control their physical activities in the performance of their service. Those are relevant but not exclusive indicia of an employer-employee relationship under this statute. As we have seen, judgment as to the

[19] The Board's conclusion in this respect is confirmed by the results reached under other statutes. Militarized guards have been treated as private employees for purposes of the Fair Labor Standards Act. *Walling* v. *Lum*, 7 Wage Hour Rep. 570. And they have consistently been treated as such by the National War Labor Board. *Detroit Steel Products Co.*, 6 War Lab. Rep. 495; *Brewster Aeronautical Corp.*, 11 War Lab. Rep. 286, 15 War Lab. Rep. 239, 240-243; *Great American Industries*, 11 War Lab. Rep. 287; *Youngstown Sheet & Tube Co.*, 15 War Lab. Rep. 500, 19 War Lab. Rep. 813; *General Motors Corp.*, 18 War Lab. Rep. 541. And see *Labor Board* v. *Carroll*, 120 F. 2d 457.

existence of such a relationship for purposes of this Act must be made with more than the common law concepts in mind. That relationship may spring as readily from the power to determine the wages and hours of another, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire or the power to control all the activities of the worker. In other words, where the conditions of the relation are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present. *Labor Board* v. *Hearst Publications, supra,* 129.

The Board's determination that there was a relationship in this case deserving of statutory protection does not reflect an isolated or careless reconciliation of the rights guaranteed by the Act with the important wartime duties of plant protection employees. In the course of its administration of the Act during the war, the Board was faced with this problem many times.[20] It was well acquainted with the important and complex considerations inherent in the situation. The responsibility of representing the public interest in such matters and of reaching a judgment after giving due weight to all the relevant factors lay primarily with the Board. See *Southern Steamship Co.* v. *Labor Board,* 316 U. S. 31, 47. In the absence of some compelling evidence that the Board has failed to measure up to its responsibility, courts should be reluctant to overturn the considered judgment of the Board and to substitute their own ideas of the public interest. We find no such evidence in this case.

Here we have the Board's considered and consistent

[20] See, *e. g., Chrysler Corporation,* 44 N. L. R. B. 881; *Budd Wheel Co.,* 52 N. L. R. B. 666; *Dravo Corporation,* 52 N. L. R. B. 322. See also National Labor Relations Board, Seventh Annual Report (1943), p. 63; Eighth Annual Report (1944), p. 57.

judgment that militarized plant guards may safely be permitted to join unions and bargain collectively and that their military duties and obligations do not suffer thereby. In agreement with that viewpoint has been the War Department, the agency most directly concerned with the military aspects of the problem. Its regulations and directives have clearly acknowledged the feasibility of recognizing collective bargaining rights of these guards during wartime, provided only that no encroachment is made upon military necessities. This policy of the Board, moreover, has been confirmed by experience. The Board states that it has certified bargaining representatives for units of militarized guards in more than 105 cases, in none of which has any danger to the public interest or to the war effort resulted.

Under such circumstances, it would be folly on our part to disregard or to upset the policy the Board has applied in this case.[21] Since the Board's order is in accord with the law and has substantial roots in the evidence, it should have been enforced by the Circuit Court of Appeals. Respondent's objections to the language and scope of the order are either without merit or have been removed by the demilitarization of the guards. And any issues concerning the subsequent deputization of the guards as policemen are answered by our decision in *Labor Board* v. *Jones & Laughlin Steel Corp.*, *post*, p. . The judgment below is accordingly

Reversed.

THE CHIEF JUSTICE, MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON dissent substantially for the reasons set forth in the opinion of the court below, 155 F. 2d 567.

[21] In adopting the War Labor Disputes Act, 57 Stat. 163, Congress provided in § 7 (a) (2) that all actions of the National War Labor Board must conform to the provisions of the National Labor Relations Act—an indication that Congress deemed the preservation of the right to collective bargaining to be essential in war industries.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 419

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

E. C. ATKINS AND COMPANY,

Respondent.

PETITION FOR STAY OF MANDATE.

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E. C. ATKINS AND COMPANY,
Respondent.

PETITION FOR STAY OF MANDATE.

The Respondent, E. C. Atkins and Company, respectfully prays that this Court stay the issuance of its mandate in this case from June 13, 1947 until the "Petition for Rehearing of Respondent, E. C. Atkins and Company," filed contemporaneously herewith, is finally disposed of by this Court. As ground for this Petition Respondent respectfully shows the Court the following:

1. Pursuant to Rule 34 of the Rules of this Court the mandate in this case will issue as of course after June 13, 1947, which is twenty-five days from May 19, 1947, the day upon which the judgment herein was entered.

2. That Respondent contemporaneously herewith is filing with this Court a "Petition for Rehearing of Respondent, E. C. Atkins and Company."

3. That this Petition for Stay of Mandate, like the Petition for Rehearing, is presented in good faith and not for delay.

Respectfully,

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SUPREME COURT OF THE UNITED STATES

No. 418.—October Term, 1946.

National Labor Relations Board, Petitioner, v. Jones & Laughlin Steel Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[May 19, 1947.]

Mr. Justice Murphy delivered the opinion of the Court.

Like *Labor Board* v. *Atkins & Co.*, *ante*, p. —, this case involves the rights of militarized plant guards under the National Labor Relations Act, 29 U. S. C. § 151 *et seq.* But certain problems are raised here which are not present in the *Atkins* case.

Respondent owns and operates several large steel manufacturing works and was engaged in the production of war materials during the recent war. At respondent's Otis Works at Cleveland, Ohio, about 4,700 individuals are employed. Production and maintenance employees constitute the great bulk of these workers. But there is also included in the total a group of guards and watchmen, numbering about sixty men normally.

A union affiliated with the United Steelworkers of America, C. I. O., has been the exclusive bargaining agent for the production and maintenance employees. Under a contract made with respondent late in 1942, this union disclaimed any representation of "Foremen or Assistant Foremen in charge of any classes of labor, watchmen, salaried employees and nurses." On March 15, 1943, this union filed a petition for investigation and certification of representatives pursuant to § 9 (c) of the Act, in which it sought to be certified as the collective bargaining rep-

resentative of the guard force. A hearing was then held. Respondent claimed that a unit composed of these guards was inappropriate because they "perform certain assigned work that is strictly representative of management." Respondent also claimed that any allegation by the union that a unit including watchmen is appropriate was "a direct contravention" of the 1942 contract. And it was further alleged that any unionization of watchmen or guards was particularly inappropriate during a time of war, that their duties "do not differ greatly from the duties performed by members of a city, county or state police force" and that these guards had been sworn in as auxiliary military police of the United States Army.

The testimony at the hearing showed that there were currently 72 plant protection employees. Of these, 58 were patrolmen whose sole duty was to protect and guard the Otis Works; there were 2 firemen to maintain the fire equipment; 2 dump laborers were assigned to work at a refuse dump while watching that section of the plant; and there were 8 lieutenants and 2 fire captains supervising the others. All of them were carried on respondent's payroll and were under respondent's control as to pay, benefits and conditions of employment. And, as respondent had alleged, they had been sworn in as civilian auxiliaries to the military police of the United States Army, in the same manner and under the same conditions as detailed in the *Atkins* case.

On May 3, 1943, the Board issued its decision and direction of election. 49 N. L. R. B. 390. It found that "all patrolmen, watchmen, and firemen, including dump laborers, employed by the Company at its Otis Works, but excluding lieutenants, captains and supervisors" constituted an appropriate unit and that an election should be held by the employees in this unit to determine if they desired to be represented by the Steelworkers union. It rejected all of respondent's contentions, pointing out

among other things that the union, while representing production and maintenance employees, intended to bargain for the plant guards and watchmen as a separate unit.

The election resulted in the selection of the Steelworkers union as the bargaining representative of the unit in question. The union was certified as the exclusive representative of the unit, respondent refused to bargain with the union and the Board issued its complaint based upon that refusal. On December 2, 1943, the Board reaffirmed the appropriateness of the unit and found that respondent had committed unfair labor practices in refusing to bargain. The usual order was entered. 53 N. L. R. B. 1046.

The Sixth Circuit Court of Appeals denied the Board's petition for a decree enforcing its order. 146 F. 2d 718. While upholding the Board's determination that the militarized guard forces were employees within the meaning of the National Labor Relations Act, the court felt that the unit selected for bargaining purposes was inappropriate and reflected a disregard by the Board of the national welfare. In the eyes of that court, the Board's fatal error was its authorizing the militarized guards to join the same union which represented the production and maintenance employees because "when they were inducted into the Unions and became subject to their orders, rules and decisions, the plant protection employees assumed obligations to the Unions and their fellow workers, which might well in given circumstances bring them in conflict with their obligation to their employers, and with their paramount duty as militarized police of the United States Government." 146 F. 2d at 722.

The Board filed a petition in this Court for a writ of certiorari. As in the *Atkins* case, the Board pointed out that the plant protection employees had been demilitarized at a date (May 29, 1944) subsequent to the re-

fusals to bargain, but urged that this fact did not make the case moot. We granted the writ of certiorari at the same time as we granted the writ in the *Atkins* case, vacated the judgment below and remanded the cause to the Circuit Court of Appeals "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof on the Board's orders." 325 U. S. 838.

The Board and the respondent then entered into a stipulation relative to the dates and circumstances of the demilitarization of the guards. From this stipulation it appeared that the qualifications, strength, functions and duties of the guards continued to be the same after demilitarization as before. Also included in the stipulation were facts showing that both before and after the period of militarization, August 5, 1942, to May 29, 1944, the guards were commissioned, sworn and bonded as private policemen of the City of Cleveland and exercised "the legal powers of peace officers in their work as plant guards." It was further stipulated that because of "the magnitude and other characteristics of the Otis Works, its police protection by the ordinary police of the City of Cleveland is not practical or feasible; and, as a result, for a great many years, the police protection of the Works and the enforcement of law, peace and good order therein has been delegated wholly to the plant guard force. For similar reasons, the work of preventing and extinguishing fires has been in large part the responsibility of the guard force, rather than that of the municipal fire department."

The Board filed a motion in the Circuit Court of Appeals for a decree enforcing its order. That court denied the motion and held that the facts concerning both the demilitarization and the deputization were to be considered as though they had been presented at the hearing before the Board; on that basis, the court reaffirmed its belief that the guards were employees within the meaning

of the Act, but concluded that in view of the "drastic police powers" exercised by the guards, it was "improper for the Board to permit their organization by the same union which represents the production employees." 154 F. 2d 932.

Our decision in the *Atkins* case makes clear that the demilitarization of the guards did not render this case moot. The order was a continuing command which may be effectuated in the future. But unless the order was valid when it was issued, there is no basis whatever for it and no court can decree its enforcement in the future. Hence its validity must be judged as of the time when it was issued, a time when the guards were still militarized. This is not to say, however, that events subsequent to demilitarization are irrelevant in deciding whether the order should be enforced. All that we hold is that demilitarization in and of itself is not enough to render the order or the case moot.

The *Atkins* decision likewise disposes of any issues relating to the effect of militarization upon the status of the guards as employees within the meaning of § 2 (3) of the National Labor Relations Act. To that extent, the Board's order here was plainly valid. Unanswered by the *Atkins* decision, however, is the question whether the militarization of the plant guards precluded the Board from grouping the guards in a separate unit and permitting them to choose as their bargaining representative a union which also represented production and maintenance employees. To that issue, which is the primary one raised by this case, we now turn.

The Board, of course, has wide discretion in performing its statutory function under § 9 (b) of deciding "the unit appropriate for the purposes of collective bargaining." *Pittsburgh Plate Glass Co.* v. *Labor Board*, 313 U. S. 146. It likewise has discretion to place appropriate limitations on the choice of bargaining representatives should it find

that public or statutory policies so dictate. Its determinations in these respects are binding upon reviewing courts if grounded in reasonableness. *May Stores Co.* v. *Labor Board*, 326 U. S. 376, 380. A proper determination as to any of these matters, of course, necessarily implies that the Board has given due consideration to all the relevant factors and that it has correlated the policies of the Act with whatever public or private interests may allegedly or actually be in conflict.

Thus, in determining the proper unit for militarized guards and in deciding whether they should be permitted to choose the same union that represents production and maintenance employees, the Board must be guided not alone by the wishes of the guards or the union or by what is appropriate in the case of non-militarized guards. It must also give due consideration to the military duties and obligations of the guards and their possible relationships to a union representing other employees; it must consider what limitations, if any, on the normal freedom to choose whatever representative the guards may desire are necessitated by the war effort.

It is clear that the Board has given these matters due consideration. It has not acted in this case in disregard of the national welfare. Sanctioning the creation of a separate unit of respondent's guards and permitting them to select a union of their own choosing, a union which happened to be the representative of the production and maintenance employees, are indicative of a considered, mature judgment on the Board's part. The problem has been raised in many cases before the Board and its conclusion is in accord with that reached by the War Department.

In *Chrysler Corp.*, 44 N. L. R. B. 881, *Dravo Corp.*, 52 N. L. R. B. 322, and *Armour and Co.*, 63 N. L. R. B. 1200, the Board has spelled out the various considerations that have led it to adopt the policy applied in this case. Those

cases reveal the Board's belief that freedom to choose a bargaining agent includes the right to select an agent which represents other employees in a different bargaining unit. This principle may safely be applied to militarized guards, in the Board's opinion, since the collective bargaining process is flexible enough to allow for the increased responsibilities placed upon the militarized guards. And the Board has concluded that the remedy for inefficiency or wilful disregard or neglect of duty on the part of such guards lies in the power of the employer to discipline or discharge them and in the power of the military authorities to take whatever steps may be necessary to protect the public interest. Moreover, the Board has discovered no serious question as to any conflict between loyalties to the Army and to the union, the Board finding no basis to assume that membership in a union tends to undermine the patriotism of militarized guards or that loyalty to the United States would be secondary in their minds to loyalty to the union. But one restriction is placed upon the statutory freedom of the militarized guards. The Board insists that they be placed in separate bargaining units so that they may be better able to function within the military sphere and so that the military authorities may be able to exercise greater control over them.

This policy of the Board coincides with that expressed in the regulations of the War Department. As we pointed out in the *Atkins* case, *ante*, p. —, the military authorities have given full sanction to collective bargaining on the part of militarized guards, provided only that such action does not interfere with their military obligations. Paragraph 6h (2) of Circular No. 15, issued on March 17, 1943, by Headquarters, Army Service Forces, acknowledges with approval the Board's policy of permitting militarized guards to be represented in collective bargaining with the management by a bargaining unit other than

that composed of the production and maintenance workers, even though both bargaining units may be affiliated with the same labor organization. A clarifying memorandum of the War Department, dated July 10, 1943, reiterates the War Department attitude still further: "In the event that plant guards enrolled as Auxiliary Military Police desire to be represented in collective bargaining with the management, they should be represented by a bargaining unit other than that representing the production and maintenance workers. However, in such event, both bargaining units may be affiliated with the same trade-union local, provided they are, in fact, separate bargaining units."

We are unable to say that the policy formulated by the Board is without reason. When the employer retains unfettered power to fix the wages, hours or other working conditions of militarized guards, the guards stand in the same relation to the employer regarding those matters as do production and maintenance employees. In disputes with the employer over those matters, they suffer from the same inequality of bargaining power as suffered by other unorganized employees; the appropriateness and need of collective bargaining on their part through freely chosen representatives are equally as great. But to prevent them from choosing a union which also represents production and maintenance employees is to make the collective bargaining rights of the guards distinctly second-class. Such a union may be the only one willing and able to deal with the employer. Its experience and acquaintance with the employer and the plant may make it specially qualified to bargain for the guards. The guards might thus be deprived of effective bargaining rights if they are denied the right to choose such a union. Freedom to choose, in this statutory setting, must mean complete freedom to choose any quali-

fied representative unless limited by a valid contrary policy adopted by the Board.

After deliberation, the Board has concluded that this freedom can safely be recognized to the fullest extent as to militarized guards, provided only that they be placed in separate bargaining units. We cannot say that this conclusion is one so lacking in an appreciation of the military necessities of the situation that we should voice our disapproval and substitute our own views of public policy. It is significant that the Board, in weighing the military requirements against the normal policies of the Act, has arrived at a result which coincides with that reached by the War Department. The latter agency has been satisfied that militarized guards can safely join and choose unions representing other employees without impairing their loyalty to the United States or their ability to perform their military duties satisfactorily. We assume that attitude was adopted after a full consideration of all the military necessities, matters which are peculiarly within the competence and knowledge of the War Department. In light of that fact, it is impossible to say that a civilian agency erred in failing to insist upon what the military experts found to be unnecessary. To prohibit militarized guards from joining or choosing unions representing production and maintenance workers on grounds of military necessity is to erect limitations which not even those most familiar with the military situation thought essential or desirable. And in this nation, the statutory rights of citizens are not to be readily cut down on pleas of military necessity, especially pleas that are unsupported by military authorities. Certainly it would take more than the speculation and theories advanced by the court below to undermine the foundation of the policy adopted in this respect by the Board.

Moreover, the experience of the Board has revealed none of the dire consequences which the court below feared

might flow from the application of the policy in question. 146 F. 2d at 722–723. In its brief before us, the Board has stated that it has certified bargaining representatives for units of militarized guards in more than 105 cases; in more than 80 of these cases the certified union also represented a separate bargaining unit of other employees of the same employer. Employer recognition of the unions, collective bargaining and contractual relations have resulted in many instances. Yet the Board states that it has received "no indication from any source that the dangers to the public interest and particularly to the war effort which the courts below thought to inhere in that policy have in fact materialized in any case."

One final matter remains. After the Board's order was issued and after the guards at respondent's Otis Works were demilitarized, the guards were deputized by the police authorities of the City of Cleveland. The Board claims that since this matter was not raised before it, the court below was precluded by § 10 (e) of the Act from considering the effect of the deputization upon the propriety of enforcing the Board's order. *Labor Board* v. *Newport News Co.*, 308 U. S. 241, 249–250; *Marshall Field & Co.* v. *Labor Board*, 318 U. S. 253; *Labor Board* v. *Cheney Lumber Co.*, 327 U. S. 385.

But the provision of § 10 (e), that "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances," quite obviously refers to objections that might have been but were not raised in the original proceeding before the Board. In this case, however, the deputization of the guards occurred after the Board had concluded its hearing and issued its order and after the court below had refused the first time to enforce the order. It was thus a matter which could not have been raised before the Board. And the failure

of respondent to raise the then non-existent issue before the Board could not deprive the court below of power to consider the issue once it did come into existence. See *Labor Board v. Blanton Co.*, 121 F. 2d 564, 571.

When circumstances do arise after the Board's order has been issued which may affect the propriety of enforcement of the order, the reviewing court has discretion to decide the matter itself or to remand it to the Board for further consideration. For example, where the order obviously has become moot, the court can deny enforcement without further ado; but where the matter is one involving complicated or disputed facts or questions of statutory policy, a remand to the Board is ordinarily in order. In this case, however, the Board and the respondent have stipulated the facts concerning the deputization of the guards. The only issue is whether the deputization is so inconsistent with the policies of the Act that the statutory guarantees must be denied to the guards and the enforcement of the Board's order refused. That issue is one normally to be determined by the Board in the first instance, it being the function of the Board rather than the courts initially to correlate the policies of the Act with conflicting interests. But we do not believe that a remand is necessary under the special circumstances of this case.

The Board has frequently considered the status of plant guards who have been deputized as deputy sheriffs or special police. Where the private employer retains the right to fix the wages, hours or other working conditions of such guards, the Board's uniform conclusion has been that they are employees of the private employer and that they retain their rights under the National Labor Relations Act. See, *e. g.*, *Luckenbach Steamship Co.*, 2 N. L. R. B. 181, 189; *American-Hawaiian Steamship Co.*, 10 N. L. R. B. 1355, 1363-1364; *American Brass Co.*, 41 N. L. R. B. 783, 785; *Bethlehem-Fairfield Shipyard, Inc.*,

61 N. L. R. B. 901, 905–906; *Standard Steel Spring Co.*, 62 N. L. R. B. 660, 662–663. As in the case of militarized guards, the Board has found no evidence that when deputized guards join unions or engage in collective bargaining through freely chosen representatives their honesty, their loyalty to police authorities, or their competence to execute their police duties satisfactorily is undermined. It is sufficient, in the Board's judgment, to protect the special status of these guards by segregating them in separate bargaining units.

We find it impossible to say that the Board is wrong in adopting this policy as to deputized guards. It is a common practice in this country for private watchmen or guards to be vested with the powers of policemen, sheriffs or peace officers to protect the private property of their private employers. And when they are performing their police functions, they are acting as public officers and assume all the powers and liabilities attaching thereto. *Thornton* v. *Missouri Pacific R. Co.*, 42 Mo. App. 58; *Dempsey* v. *New York Central & Hudson River R. Co.*, 146 N. Y. 290, 40 N. E. 867; *McKain* v. *Baltimore & Ohio R. Co.*, 65 W. Va. 233, 64 S. E. 18; *Neallus* v. *Hutchinson Amusement Co.*, 126 Me. 469, 139 A. 671. But it has never been assumed that such deputized guards thereby cease to be employees of the company concerned or that they become municipal employees for all purposes. See *Chicago & N. W. R. Co.* v. *McKenna*, 74 F. 2d 155. Wages, hours, benefits and various other conditions of work normally remain subject to determination by the private employers. At least as to those matters, the deputized guards remain employees of the private employers. See *Walling* v. *Merchants Police Service*, 59 F. Supp. 873. Hence they may be held to be employees within the meaning of § 2 (3) of the National Labor Relations Act. *Labor Board* v. *Hearst Publications*, 322 U. S. 111.

Deputized guards bear the same relationship to management that non-deputized guards bear, a relationship that we discussed in the *Atkins* case, *ante*, p. —, and that we found to be adequate for the Board to find the existence of an employer-employee status. Likewise, their relationship to police or municipal authorities is not one that is necessarily inconsistent with their status as employees under the Act. Union membership and collective bargaining are capable of being molded to fit the special responsibilities of deputized plant guards and we cannot assume, as a proposition of law, that they will not be so molded. If there is any danger that particular deputized guards may not faithfully perform their obligations to the public, the remedy is to be found other than in the wholesale denial to all deputized guards of their statutory right to join unions and to choose freely their bargaining agents. The state and municipal authorities, in short, have adequate means of punishing infidelity and assuring full police protection.

We find nothing in the instant case which would make inapplicable the Board's policy with respect to deputized guards, and the Board has so argued before us. The stipulated facts reveal that the guards at respondent's Otis Works were commissioned as private policemen of the City of Cleveland under § 188 of the Cleveland Municipal Code (1924), and as such are members of the municipal police force and exercise the legal powers of peace officers in their work as plant guards. They are under the control of a police captain and his lieutenants, the police captain being directly responsible to respondent's director of plant security at Pittsburgh and to respondent's executive officer in general charge of the Otis Works. The police captain is also a deputy sheriff of Cuyahoga County, Ohio. It is not denied that the guards continue to be paid by respondent and that their hours, benefits and other conditions of work remain the responsibility of respondent.

The court below pointed out that the Ohio law on the status and duties of special policemen is in accord with the general rule which we have noted. In other words, special policemen are public officers when performing their public duties. *New York, Chicago & St. Louis R. Co.* v. *Fieback*, 87 Ohio St. 254, 100 N. E. 889; *Pennsylvania R. Co.* v. *Deal*, 116 Ohio St. 408, 156 N. E. 502. But none of the Ohio cases attempts to say that the public status of special policemen destroys completely their private status as employees of individual companies. Nor is there any basis for the intimation that their public duties are such as to render incompatible the recognition of rights under the National Labor Relations Act.

We therefore conclude that the facts and the law are sufficiently clear to justify a determination that the guards at respondent's Otis Works are employees within the meaning of the Act despite their deputization as municipal policemen. And they have as much right to select as their bargaining agent a union which represents production and maintenance workers as have militarized guards, the same considerations being applicable. It is obvious that the Board would apply such a policy to this case, thereby making a remand to the Board a mere formality and a needless addition to an already over-prolonged proceeding. Under such circumstances, a remand to the Board is unnecessary.

It follows that the court below should have enforced the Board's order.

Reversed.

THE CHIEF JUSTICE, MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON and MR. JUSTICE BURTON dissent substantially for the reasons set forth in the opinion of the court below, 154 F. 2d 932.

SUPREME COURT OF THE UNITED STATES

No. 419.—October Term, 1946.

National Labor Relations Board, Petitioner, v. E. C. Atkins and Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 19, 1947.]

Mr. Justice Murphy delivered the opinion of the Court.

The problem posed by this case is whether private plant guards, who are required to be civilian auxiliaries to the military police of the United States Army, are employees within the meaning of § 2 (3) of the National Labor Relations Act, 29 U. S. C. § 152 (3).

At all material times, the respondent corporation was engaged in the manufacture of saws, tools and armor plate. It employed more than 1,200 production and maintenance employees at its two plants at Indianapolis, Indiana. Before it began to produce armor plate for defense and war purposes, respondent employed about six watchmen or guards. When it entered upon war production, however, the War Department required that an auxiliary military police force of sixty-four members be established to guard the plants.

In 1943, after the necessary additional guards had been recruited, a union [1] petitioned the National Labor Relations Board for investigation and certification of representatives pursuant to § 9 (c) of the Act. It was alleged

[1] Local 1683 of the International Association of Machinists, District 90. This union did not represent any of the maintenance or production employees in respondent's plants, but it did admit to membership plant protection employees of other employers as well as those of respondent.

that the union represented the sixty-four plant guards employed by respondent at its two plants. The respondent moved to dismiss the petition on the ground that it was not the employer of the guards within the meaning of § 2 (2) and that the guards were not employees as defined by § 2 (3). A hearing was thereupon held and evidence concerning the status of the guards was introduced.

On October 19, 1943, the Board concluded from the evidence thus submitted that these plant guards were employees within the meaning of § 2 (3) despite their status as civilian auxiliaries to the military police. 52 N. L. R. B. 1470. It held that all the plant guards at respondent's two plants, excluding the chief guards, lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constituted a unit appropriate for collective bargaining. An election was therefore directed to be held, which resulted in the union in question being chosen as bargaining representative. The union was certified by the Board as the exclusive representative of the plant guards.

Subsequently, the union filed charges that the respondent had refused to bargain collectively. A complaint was issued by the Board, followed by a hearing at which evidence regarding that refusal was introduced. The Board, on May 30, 1944, issued its decision in which it concluded that the guards were employees of respondent and that the latter had committed unfair labor practices in refusing to bargain with the union. 56 N. L. R. B. 1056.

The Board accordingly issued an order requiring respondent to cease and desist from refusing to bargain collectively with the union, and commanding it to bargain with the union, upon request, in respect to rates of pay, wages, hours of employment and other conditions of em-

ployment. The Seventh Circuit Court of Appeals declined to enforce the Board's order, holding (1) that the guards were not employees of the respondent within the meaning of § 2 (3) of the Act since they were militarized, and (2) that even if the militarized guards were to be considered as employees of respondent, enforcement of the Board's order should not be allowed because to do so would be or would likely be inimical to the public welfare. 147 F. 2d 730.

In filing a petition in this Court for a writ of certiorari, the Board noted that the guard forces at respondent's plants had been demilitarized early in 1944, but urged that the case was not thereby rendered moot. We granted certiorari, vacated the judgment below and remanded the case to the Circuit Court of Appeals "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof on the Board's orders." 325 U. S. 838.

The Board and the respondent entered into a stipulation relative to the dates and circumstances of the demilitarization of the guards. The stipulation noted that most of the guards had been released from service and that only eleven of them had been retained as watchmen by respondent as of February 23, 1946; and those eleven had been "sworn in as Deputy Policemen by the City of Indianapolis." The Board then filed a motion in the Circuit Court of Appeals for a decree enforcing its order. This motion was denied and the prior holding was reaffirmed, the court stating that the demilitarization was irrelevant to the issue of whether the plant guards were employees at the time when the respondent refused to bargain with the union. 155 F. 2d 567. The importance of the problem raised by the case, together with a conflict over the answer to this problem between the court below and the Sixth Circuit Court of Appeals, *Labor Board* v.

Jones & Laughlin Steel Corp., 146 F. 2d 718, prompted us to grant a further review of the case.

We agree with the Circuit Court of Appeals that the demilitarization of the guards did not render the case moot and that it had no effect upon the prime issue in the case. The Board's order was based upon a holding that the respondent committed an unfair labor practice by refusing to recognize and bargain with the union selected by the militarized guards. And that refusal occured at a time when the guards were still militarized. A determination that the respondent had a statutory duty to bargain with the union at that time is therefore essential to the validity of the Board's order. The fact that the guards were subsequently demilitarized did not affect their status as employees at this crucial juncture; nor did it relieve respondent of any duty to bargain that it might otherwise have had at that point.

The Board's order, moreover, was a continuing direction to bargain collectively with the union designated by the guards. Demilitarization has not dispensed with whatever duty respondent may have now or in the future to comply with that order. If the guards were employees of respondent entitled to the benefits of the Act during the period of militarization, *d fortiori* they are employees now that all connections with the Army have been severed; and their statutory rights continue to be entitled to full respect. Respondent's guard force still remains in existence, although considerably reduced in size, and the union presumably continues to be the representative of the guards. Under such circumstances, the case is not moot. *Labor Board* v. *Greyhound Lines*, 303 U. S. 261, 271; *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, 334. See also *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257, 260.

As to the merits, it is elementary that the Board has the duty of determining in the first instance who is an em-

ployee for purposes of the National Labor Relations Act and that the Board's determination must be accepted by reviewing courts if it has a reasonable basis in the evidence and is not inconsistent with the law. *Labor Board* v. *Hearst Publications*, 322 U. S. 111. Realizing that labor disputes and industrial strife are not confined to those who fall within ordinary legal classifications, Congress has not attempted to spell out a detailed or rigid definition of an employee or of an employer. The relevant portion of § 2 (3) simply provides that "The term 'employee' shall include any employee, . . ." In contrast, § 2 (2) states that "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, . . ." As we recognized in the *Hearst* case, the terms "employee" and "employer" in this statute carry with them more than the technical and traditional common law definitions. They also draw substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life.

And so the Board, in performing its delegated function of defining and applying these terms, must bring to its task an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by this statute. This does not mean that it should disregard the technical and traditional concepts of "employee" and "employer." But it is not confined to those concepts. It is free to take account of the more relevant economic and statutory considerations. And a determination by the Board based in whole or in part upon those considerations is entitled to great respect by a reviewing court, due to the Board's familiarity with the problems and its experience in the administration of the Act.

Laying aside for the moment the matter of militarization, we cannot say in this case that the Board would be legally unjustified in holding that the rank and file plant

guards are employees within the meaning of the Act. They bear essentially the same relation to management as maintenance and production employees. In fact, they are indistinguishable from ordinary watchmen, gatemen, patrolmen, firemen and guards—persons who have universally been regarded and treated as employees for purposes of union membership and employee benefits. They perform such duties as inspecting persons, packages and vehicles, carrying cash to various parts of the plant, and generally surveying the premises to detect fires, suspicious circumstances and sabotage. Moreover, the guards in question are not supervisors; they possess no power to affect the working conditions of other employees. Without collective bargaining, they are subject to the unilateral determination by the employer of their wages, hours, seniority, tenure and other conditions of work. Individually, they suffer from inequality of bargaining power and their need for collective action parallels that of other employees. From any economic or statutory standpoint, the Board would be warranted in treating them as employees. Even under conventional standards, they are controlled by management to an extent sufficient to justify designating them as employees.

Nor can we say, as a matter of law, that permitting plant guards to be considered as employees entitled to the benefits of the Act would make them any less loyal to their employer in carrying out their designated tasks. In guarding the plant and personnel against physical danger, they represent the management's legitimate interest in plant protection. But that function is not necessarily inconsistent with organizing and bargaining with the employer on matters affecting their own wages, hours and working conditions. They do not lose the right to serve themselves in these respects merely because in other respects they represent a separate and independent interest of management. As in the case of foremen, we see no

basis in the Act whatever for denying plant guards the benefits of the statute when they take collective action to protect their collective interests. *Packard Motor Car Co. v. Labor Board*, 330 U. S. —.

We cannot assume, moreover, that labor organizations will make demands upon plant guard members or extract concessions from employers so as to decrease the loyalty and efficiency of the guards in the performance of their obligations to the employers. There is always that possibility, but it does not qualify as a legal basis for taking away from the guards all their statutory rights. In other words, unionism and collective bargaining are capable of adjustments to accommodate the special functions of plant guards.

The crucial problem in this case, however, is whether the militarization of the plant guards changed their status as employees as a matter of law so as to prohibit the Board from extending to them the benefits of the Act which they would otherwise have. The short answer to that problem is that militarization as such does not necessarily change the status of plant guards. It may or may not bring about a change, depending upon the particular circumstances. The militarization may be a qualified one; the employer may retain power to fix wages, hours and other conditions of work; the need and desirability for collective action on the part of the guards may exist as to the matters over which the employer retains control; and a recognition of the statutory rights of the guards may be entirely consistent with their military obligations. If that is the case, the guards remain employees for purposes of the Act. But if the militarization is such as to transfer to the Army all the matters over which the employer would normally have control, matters which would form the basis for collective bargaining as contemplated by the Act, the guards may lose their status as private employees within the purview of the statute.

The Board's determination that the militarization of the guards in respondent's plants was of a type that did not alter their status as employees under the Act must therefore be tested by the applicable War Department regulations and by the evidence introduced at the hearing before the Board. If such a result is consistent with the regulations and has a reasonable basis in the other evidence, the Board's order must be sustained.

The plant guards in this case were enrolled as civilian auxiliaries to the military police under War Department regulations issued pursuant to Executive Order No. 8972, dated December 12, 1941. That order authorized the Secretary of War to establish and maintain military guards and patrols, and to take other appropriate measures, to protect certain strategic premises, materials and utilities from injury and destruction. The Secretary of War accordingly directed the military organization of plant guard forces as auxiliary military police at plants important to the prosecution of the war, the directive to that effect being issued by the Adjutant General on July 2, 1942. Supplementary regulations were contained in Circular No. 15, issued on March 17, 1943, by Headquarters, Army Service Forces.[2]

As stated by these regulations, the purpose of the military organization of the plant guards was "to increase the authority, efficiency, and responsibility of guard forces at plants important to the prosecution of the war, and through military training to provide auxiliary forces throughout the United States to supplement the Army in wartime emergency situations."[3] It was made clear,

[2] Circular No. 15 was not introduced into evidence in the proceeding before the Board. But it was issued by military authorities pursuant to the power vested in the Secretary of War by Executive Order No. 8972 and we may take judicial notice of it. *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 483–484.

[3] Circular No. 15, par. 1a.

however, that plant managements were not relieved of their responsibility "for providing adequate protection at all times against all hazards."[4] In other words, employers who wished to obtain government contracts for the production of war materials were required to provide "adequate protection" for their plants where the material was to be produced; if the existing plant protection forces were inadequate, additional guards were to be recruited by the employers. But all the original and additional guards were to be enrolled as civilian auxiliaries to the military police.

The military authorities reserved the right to veto the hiring or firing of any plant guard where such action by the employer might impair the efficiency of the guard force.[5] And the military plant guard officers were authorized to take appropriate action "through the plant management" to correct conditions which might result in "defective or inadequate performance by the guard forces of its ordinary protective duties."[6]

The functions of these civilian auxiliaries to the military police were stated to be twofold: "(1) To provide internal and external protection of the plant against sabotage, espionage, and natural hazards. (2) To serve with the Army in providing protection to the plant and its environs in emergency situations."[7] They were subject to call for military service even where emergencies arose at places other than the plants where they normally worked. To these ends, military plant guard officers were authorized to exercise direct control over the guard forces "only in matters relating to military instruction and duties as Auxiliary Military Police."[8] But such orders "will be issued only after consultation with and, if possible, con-

[4] *Id.* par. 1b.
[5] *Id.* par. 6b (2).
[6] *Id.* par. 1b.
[7] *Id.* par. 2a.
[8] *Id.* par. 5a (2).

currence by the plant management. . . . Control, therefore, will be exercised as heretofore through the plant management except at drill and except in emergency situations. Although the plant guard officers will be in command at all times, *they will not supplant the civilian guard officers,* and unless expediency demands otherwise will exercise their authority through the chain of command established by the plant management."[9] The regulations also provided that the military drill of the guard forces should not exceed one hour per week "except with the approval of the plant management."[10]

As to the employer's relations with the guard force, the regulations were explicit in recognizing that those relations remained essentially the same as if there were no militarization. According to Circular No. 15: "Basically, the militarization of plant guard forces does not change the existing systems of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant managements. Guards in the employ of a private employer may, as heretofore, be dismissed by that employer."[11] A veto power over employment and dismissal, of course, was retained by the military. It was further provided: "The status of the employer in respect to the employee benefits for the guard force is not changed. For example, social security, workmen's compensation, and employer's liability provisions remain unaffected."[12] And the employer was expected to train the guard forces in their ordinary protective duties and was required to furnish them with uniforms and weapons.[13]

[9] *Id.* pars. 5c (2) and 6a (1).

[10] *Id.* par. 7g (1).

[11] *Id.* par. 6b (1).

[12] *Id.* par. 6f.

[13] The guards were required to salute Army officers and had the right to arrest anyone in the plants. They carried identification cards issued by the War Department and wore arm bands on which appeared the words "Auxiliary Military Police." *Id.* par. 7.

The right of the plant guards to bargain collectively was recognized by Circular No. 15, paragraph 6h (2) of which provided: "Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police. In view of recent decisions by the National Labor Relations Board (see In re Lord Mfg. Co. & United Rubber Workers of America, CIO, Case No. R-4826, February 1943) [*Lord Manufacturing Co.*, 47 N. L. R. B. 1032], the Auxiliary Military Police should be represented in collective bargaining with the management by a bargaining unit other than that composed of the production and maintenance workers, although both bargaining units may be affiliated with the same labor organization. Where the guards are not now included in the same bargaining unit, this is mandatory; where the guards are included in such unit, serious consideration will be given to effect a change to conform to the foregoing policies." Provision was also made that collective bargaining agreements covering plant guards who were civilian auxiliaries should include a clause recognizing that nothing in the collective bargaining relationship should interfere with the duties imposed upon the guards as auxiliary military police.[14]

The guards were required to sign agreements with the United States.[15] Each agreement stated that the individual, who had been or was about to be employed by the particular company as a guard at its plant, agreed that he would support and defend the Constitution, bear true faith and allegiance to the Constitution, and faithfully discharge his duties as a civilian auxiliary to the military

[14] *Id.* par. 6h (1).

[15] If a guard refused to sign this agreement, he might be, but need not be, temporarily retained with the understanding that he would be dismissed as soon as he could be replaced, and in any event within a reasonable time. *Id.* par. 5b (1).

police. He also acknowledged in this agreement that appropriate Articles of War had been read and explained to him and that he was subject to military law during his employment.[16] The applicable regulations then provided that he could be court martialed where no other effective form of punishment would be effective. But "Unlike the court-martial punishment of a person in military service, a court martial cannot punish a member of the Auxiliary Military Police by reduction in military grade or by forfeiture of pay and allowances. Analogous punishments might be imposed, such as reduction in grade in the guard organization or temporary suspension from duty. A fine, as distinguished from forfeiture, is regarded as an appropriate form of punishment." [16] In all other respects, the guards remained subject to the civil courts.

The evidence and testimony submitted to the Board confirmed the fact that the plant guards in respondent's two plants were militarized in accordance with the foregoing regulations. The guards at each plant were under the direct supervision of a chief guard and several lieutenants—all of whom were civilians recruited by the respondent like the rank and file guards. The military superior of the chief guards was the District Plant Guard Officer stationed at the Continuous Security District Office of the War Department, Cincinnati, Ohio, an officer who also had charge of guard forces at other plants in the district. A general directive issued by this office repeated many of the provisions of Circular No. 15.[17] It also provided that orders and regulations for the auxiliary military police would be issued in the name of the Chief of the District "after plant management has indicated its concurrence by signing the guard order in the lower left hand corner." But the only guard orders received by the chief guards at re-

[16] *Id.* par. 8d.

[17] This directive, however, omitted par. 6h (2) of Circular No. 15, dealing with the right of guards to bargain collectively.

spondent's plants were three general ones signed by the District Plant Guard Officer, orders that were applicable to all militarized guards in the district. All the specific orders that were ever issued emanated from the chief guards. About the only direct contact between the military authorities and these guards occurred during the weekly drill period.

Respondent recruited the necessary additional guards through its ordinary employment channels and it had the power to initiate dismissals from the force. Such actions, however, were subject to the approval of the military. Respondent at all times carried the guards on its regular pay rolls, determined their rate of compensation and paid their wages after making appropriate deductions. And since it did not operate on a cost-plus basis, respondent actually bore the cost of the guards' wages.[18] Respondent did not attempt to give orders to the guards, merely making suggestions to the chief guards. The latter worked in close cooperation with respondent's personnel manager and no friction developed. Respondent delegated to the chief guards its power to determine the guards' working hours and the promotion policies in regard to them. Finally, respondent maintained its liability as to the guards on matters of social security and workmen's compensation and was obliged to obey all minimum wage and maximum hour requirements.

[18] Respondent argues that it was forced to pay the guards because of the War Department's action in requiring additional plant protection. But respondent was not forced to enter into its war production contracts with the Government. It did so voluntarily and with the understanding that it would comply with any terms and conditions the Government saw fit to impose. One of these conditions was that respondent expand its peacetime guard force of six men to a wartime complement of sixty-four. So far as these additional guards being respondent's employees is concerned, it is no different from a requirement that respondent employ more chemists or other production experts to facilitate execution of the contracts.

From the foregoing, an ample basis is evident to support the Board's determination that militarization did not destroy the employee status of the guards in respondent's plants. The War Department regulations and the actual practice in these plants were based upon the explicit assumption that the guards were the private employees of respondent rather than employees or soldiers of the United States. The regulations made it unmistakable that the normal, private employer-employee relationship was to remain substantially intact. Especially clear was the fact that the right of the guards to join unions and to bargain collectively was to be respected. The military authorities took over from respondent only those attributes of control which were necessary to effectuate the rather limited military program, many aspects of that transferred power being exercisable by the Army only in the gravest emergencies.

We cannot say that the Board was without warrant in law or in fact in concluding that respondent retained "a sufficient residual measure of control over the terms and conditions of employment of the guards" so that they might fairly be described as employees of respondent.[19] The most important incidents of the employer-employees relationship—wages, hours and promotion—remained matters to be determined by respondent rather than by the

[19] The Board's conclusion in this respect is confirmed by the results reached under other statutes. Militarized guards have been treated as private employees for purposes of the Fair Labor Standards Act. *Walling v. Lum*, 7 Wage Hour Rep. 570. And they have consistently been treated as such by the National War Labor Board. *Detroit Steel Products Co.*, 6 War Lab. Rep. 495; *Brewster Aeronautical Corp.*, 11 War. Lab. Rep. 286, 15 War Lab. Rep. 239, 240–243; *Great American Industries*, 11 War. Lab. Rep. 287; *Youngstown Sheet & Tube Co.*, 15 War. Lab. Rep. 500, 19 War Lab. Rep. 813; *General Motors Corp.* 18 War Lab. Rep. 541. And see *Labor Board* v. *Carroll*, 120 F. 2d 457.

Army. Respondent could settle those vital matters unilaterally or by agreement with the guards. And the guards were free to negotiate and bargain individually or collectively on these items. It is precisely such a situation to which the National Labor Relations Act is applicable. It is a situation where collective bargaining may be appropriate and where statutory objectives may be achieved despite the limitations imposed by militarization. Under such circumstances, the Board may properly find that an employee status exists for purposes of the Act.

In this setting, it matters not that respondent was deprived of some of the usual powers of an employer, such as the absolute power to hire and fire the guards and the absolute power to control their physical activities in the performance of their service. Those are relevant but not exclusive indicia of an employer-employee relationship under this statute. As we have seen, judgment as to the existence of such a relationship for purposes of this Act must be made with more than the common law concepts in mind. That relationship may spring as readily from the power to determine the wages and hours of another, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire or the power to control all the activities of the worker. In other words, where the conditions of the relation are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present. *Labor Board* v. *Hearst Publications, supra*, 129.

The Board's determination that there was a relationship in this case deserving of statutory protection does not reflect an isolated or careless reconciliation of the rights guaranteed by the Act with the important wartime duties of plant protection employees. In the course of

its administration of the Act during the war, the Board was faced with this problem many times.[20] It was well acquainted with the important and complex considerations inherent in the situation. The responsibility of representing the public interest in such matters and of reaching a judgment after giving due weight to all the relevant factors lay primarily with the Board. See *Southern Steamship Co.* v. *Labor Board*, 316 U. S. 31, 47. In the absence of some compelling evidence that the Board has failed to measure up to its responsibility, courts should be reluctant to overturn the considered judgment of the Board and to substitute their own ideas of the public interest. We find no such evidence in this case.

Here we have the Board's considered and consistent judgment that militarized plant guards may safely be permitted to join unions and bargain collectively and that their military duties and obligations do not suffer thereby. In agreement with that viewpoint has been the War Department, the agency most directly concerned with the military aspects of the problem. Its regulations and directives have clearly acknowledged the feasibility of recognizing collective bargaining rights of these guards during wartime, provided only that no encroachment is made upon military necessities. This policy of the Board, moreover, has been confirmed by experience. The Board states that it has certified bargaining representatives for units of militarized guards in more than 105 cases, in none of which has any danger to the public interest or to the war effort resulted.

Under such circumstances, it would be folly on our part to disregard or to upset the policy the Board has applied

[20] See, *e. g.*, *Chrysler Corporation*, 44 N. L. R. B. 881; *Budd Wheel Co.*, 52 N. L. R. B. 666; *Dravo Corporation*, 52 N. L. R. B. 322. See also National Labor Relations Board, Seventh Annual Report (1943), p. 63; Eighth Annual Report (1944), p. 57.

in this case.[21] Since the Board's order is in accord with the law and has substantial roots in the evidence, it should have been enforced by the Circuit Court of Appeals. Respondent's objections to the language and scope of the order are either without merit or have been removed by the demilitarization of the guards. And any issues concerning the subsequent deputization of the guards as policemen are answered by our decision in *Labor Board* v. *Jones & Laughlin Steel Corp.*, *post*, p. —. The judgment below is accordingly

Reversed.

THE CHIEF JUSTICE, MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON dissent substantially for the reasons set forth in the opinion of the court below, 155 F. 2d 567.

[21] In adopting the War Labor Disputes Act, 57 Stat. 163, Congress provided in § 7 (a) (2) that all actions of the National War Labor Board must conform to the provisions of the National Labor Relations Act—an indication that Congress deemed the preservation of the right to collective bargaining to be essential in war industries.